Mahisha Sulaiha Abdul Majeed v Ketua Pengarah Pendaftaran & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01(A)-273–06 OF 2020 AND W-01(NCVC)(A)-531–09 OF 2021

KAMALUDIN MD SAID, AZIZAH NAWAWI AND NANTHA BALAN JJCA

9 AUGUST 2022

Citizenship — Operation of law, by — Article 14(1)(b) read with s 1(b) of Part II of Second Schedule of Federal Constitution ('the FC') — Whether citizenship provisions in FC were gender discriminatory — Overseas-born children of Malaysian fathers automatically acquired Malaysian citizenship by operation of law but not so for overseas-born children of Malaysian mothers married to foreigners — Whether this blatant discrimination against mothers resulted from way citizenship provisions in FC were phrased to favour fathers — Whether 2001 amendment to art 8 of the FC to eliminate discrimination against citizens in any law, inter alia, on ground of gender gave hope to Malaysian mothers that they would have same rights as Malaysian fathers in the determination of their children's nationality

The two appeals herein arose from conflicting decisions of the High Court on the same issue of whether a foreign-born child of a legitimate marriage between a Malaysian mother and a non-Malaysian father was entitled to Malaysian citizenship by operation of law. As the law presently stood, if that child's father had been a Malaysian, regardless of who he was married to, the child automatically became a Malaysian citizen by operation of law. In Appeal 273, the appellant ('Mahisha') was the legitimate child of a Malaysian mother and an Indian-citizen father. Mahisha's two siblings — a brother and a sister — were Malaysian citizens because they were born in Malaysia and thereby fulfilled the requirement in s 1(a) of Part II of the Second Schedule of the Federal Constitution ('the FC') to become citizens. But since she was born in India, Mahisha was denied Malaysian citizenship even though she formally applied for it under art 15(2) of the FC. Mahisha filed an originating summons ('OS') for declarations that: (a) by virtue of her mother's citizenship, she was a Malaysian citizen by operation of law under art 14(1)(b) read with s 1(b) of Part II of the Second Schedule of the FC; (b) that the word 'father' in the said s 1(b) should be interpreted to include 'mother' or either one of the parents; and (c) that the Malaysian Government's failure, refusal or omission to recognise her as a Malaysian citizen contravened art 8 of the FC. Interpreting the word 'father' in the said s 1(b) literally so that it did not include 'mother', the High Court dismissed Mahisha's application. Meanwhile, in Appeal 531,

the second to the seventh respondents were Malaysian mothers who were validly married to foreigners and had children who were born outside the Federation (the first respondent acted for and on behalf of the Association of Family Support and Welfare Selangor & Kuala Lumpur and its members). Like Mahisha, the respondent-mothers had applied for citizenship by registration for their foreign-born children pursuant to art 15(2) of the FC without success. Vide an OS, the respondents sought essentially the same reliefs as Mahisha did. In addition, they sought a declaration that Malaysian mothers and fathers should have the same rights vis a vis the conferment of citizenship by operation of law on their foreign-born legitimate children. Such an approach, they contended, would be consonant with art 8(2) of the FC which provided for the eradication of discrimination against citizens in any law, inter alia, on the ground of gender and also enable Malaysia to fulfill its obligations under the Convention on the Elimination of All forms of Discrimination against Women ('CEDAW') to which it had acceded. The High Court in Appeal 513 granted the reliefs sought by the respondents. In the instant appeals, Mahisha and the respondents in Appeal 531 argued that 'father' in s 1(b) of Part II of the Second Schedule of the FC ought to be interpreted to include 'mother'. The Malaysian Government, on the other hand, argued that 'father' should be given its plain, ordinary and literal meaning since the framers of the Constitution had deliberately intended that to be so. The Government pointed out that the only time 'father' in that section was allowed to be construed to mean 'mother' was when the child was illegitimate so that he/she would acquire the mother's citizenship and avoid becoming stateless.

Held, by majority allowing Appeal 531 and dismissing Appeal 273:

(1) **(per Kamaludin Md Said JCA, majority)** The children in the present appeals were not entitled to citizenship by operation of law pursuant to s 1(b) of Part II of the Second Schedule of the FC because their fathers were not Malaysian citizens at the time of their birth. This court was bound by the interpretation given to that provision by the majority of the Federal Court in *CTEB & Anor v Ketua Pengarah Pendaftaran Negara Malaysia & Ors* [2021] 4 MLJ 236 ('CTEB'). At the moment, the underlying concepts and principles in *CTEB* held by the majority was the law to be followed. The High Court in Appeal 531 erred in failing to appreciate that the use of the word 'father' in the aforesaid provision by the framers of the Constitution was deliberate and context-sensitive. It was not meant to connote 'mother'. The High Court in Appeal 273, on the other hand, was correct in its interpretation following *CTEB* (see paras 11 & 43–44).

(2) **(per Kamaludin Md Said JCA, majority)** The word 'father' in s 1(b) of Part II of the Second Schedule referred to the father only. The court could not insert or interpret new words into s 1(b) to be read as 'mother' or to include 'mother'. The phrase used in s 1(a) and 1(d) of Part II of the

Second Schedule was 'whose parents one at least', meaning either parent. Hence, 'father' in s 1(b) had its significance and was not intended to be read as mother or father or either one of them. The only circumstance when 'father' in s 1(b) was construed to mean 'mother' was when it concerned illegitimate children as provided in s 17 of Part III of the Second Schedule (see paras 11–14).

(3) **(per Kamaludin Md Said JCA, majority)** Although the court was concerned with the 'grievances' faced by the mothers of the children concerned, it could not, in the name of progressive construction of the FC, readily empower itself to find a remedy to address those 'grievances' by altering the historical and philosophical context of the citizenship provisions as well as their fundamental underlying principles which had been accepted as an integral part of the FC. Matters concerning sensitive and controversial moral and social issues were inherently legislative questions which Parliament had to resolve (see paras 15–16 & 42).

(4) **(per Kamaludin Md Said JCA, majority)** The word 'gender' was inserted in art 8(2) of the FC vide Act A1130 with an express caveat that the amended art 8(2) was not to apply to the citizenship provisions under Part III of the FC. From the debate, it was clear that Act A1130 was not intended to alter or affect the operation of arts 14 and 15 of the FC. It followed that s 1(b) and 1(c) of Part II of the Second Schedule did not conflict with art 8(2) of the FC (see para 32).

(5) **(per Kamaludin Md Said JCA, majority)** The organic method of interpretation of the FC had no application in the present case. A harmonious/organic interpretation of the word 'father' in s 1(b) and 1(c) of Part II of the Second Schedule to include 'mother' violated the underlying intention of Act A30 in amending art 159(5) and amounted to judicial law-making that by-passed the Conference of Rulers. To interpret s 1(b) and 1(c) of Part II of the Second Schedule in the manner aforesaid to meet the needs of current times was to re-write the Constitution without first complying with the onerous procedures laid down in art 159 (see paras 39–40).

(6) **(per Azizah Nawawi JCA, majority)** The word 'father' in s 1(b) of Part II of the Second Schedule of the FC simply meant the biological father and did not mean 'mother' or 'parents'. In the present appeals, since the biological fathers of the children concerned were not Malaysian citizens, the children were not entitled to Malaysian citizenship by operation of law under art 14(1)(b) of the FC read with s 1(b) of Part II of the Second Schedule (see paras 149–150).

(7) **(per Azizah Nawawi JCA, majority)** The High Court in Appeal 531 committed a fundamental error in granting the reliefs sought by the respondents. The court failed to apply the majority decision of the

Federal Court in *CTEB* which held that 'father' in s 1(b) of Part II of the Second Schedule referred to the biological father of the child and that it was only in the specific situation where the child was illegitimate, that s 17 of Part III of the Second Schedule construed 'father' in s 1(b) to mean 'mother'. It was not open to the High Court to interpret 'father' in s 1(b) as including 'mother'. Doing so was tantamount to amending or re-writing a fundamental provision of the FC without any due regard to the role of the Conference of Rulers as prescribed under art 159(5) of the FC (see paras 75, 79, 81 & 126–127).

(8) **(per Azizah Nawawi JCA, majority)** The majority of the Federal Court in *CTEB* held that the fundamental rule in interpreting the FC was to give effect to the intention of the framers of the Constitution. The framers had deliberately used different words in different parts of the citizenship provisions to mean different things — ss 1(a), 1(d) and 1(e) of Part II of the Second Schedule used the phrase 'whose parents one at least', to mean either the father or the mother; sections 1(b) and 1(c) of Part II only used the word 'father' whereas in s 17 of Part III of the Second Schedule, a reference to an illegitimate person's 'father or his parent' was to be construed as a reference to his 'mother'. This was the only time the status of the 'mother' came into play. In fact, s 17 was the clearest proof that 'father' in s 1(b) and 1(c) of Part II of the Second Schedule meant only the biological father and did not mean or include the biological mother (see paras 85, 94–95 & 99).

(9) **(per Azizah Nawawi JCA, majority)** There was no apparent or seeming conflict in the FC between the Citizenship provisions in Part III and the Fundamental Liberties in Part II. Those provisions were of equal standing and nothing in the FC specified that Part III was subject to Part II. Article 8(2) FC should not be given primacy or priority over art 14(1)(b) read with s 1(b) of Part II of the Second Schedule because all provisions in the FC were of equal standing as between themselves and were not subordinate to any other (see paras 104 & 112).

(10) **(per Azizah Nawawi JCA, majority)** There was no seeming conflict between art 8(2) and art 14(1)(b) read with s 1(b) of Part II of the Second Schedule of the FC as the amendment to art 8(2) was not intended to have any bearing on the citizenship provisions in Part III of the FC. The majority of the Federal Court in *CTEB* had also addressed the anti-gender discrimination provisions in art 8(2) by saying that discrimination authorised by the FC, such as in art 14, was not a form of discrimination that art 8(2) sought to protect against (see paras 133–134).

(11) **(per Azizah Nawawi JCA, majority)** Although Malaysia had acceded to CEDAW, its express reservation with regard to art 9(2) of CEDAW made the issue of equality of rights in that article inapplicable in interpreting

the citizenship provisions in the FC. Also, without an express incorporation of the articles of that Convention into domestic law by an Act of Parliament, the provisions of CEDAW had no binding effect (see paras 132, 146 & 148).

(12) **(per Azizah Nawawi JCA, majority)** The suggestion that the Federal Court's later decision in *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar Bagi Kelahiran & Kematian, Malaysia* [2022] 1 MLJ 71 had affirmed its minority judgment in *CTEB* and rendered the majority decision in *CTEB* no longer applicable or binding on this court was misconceived. The court in *CCH* did not decide on the same provisions of the FC as in *CTEB*'s case and the two cases did not conflict on the same point of law. Therefore, *CCH* did not overrule *CTEB* on the interpretation of art 14(1)(b) read with s 1(b) of Part II of the Second Schedule of the FC (see paras 136 & 144).

(13) **(per Nantha Balan JCA, dissenting)** There was plainly and patently a conflict between art 8(2) of the FC and art 14(1)b) read with s 1(b) of Part II of the Second Schedule of the FC as the former provided for the elimination of discrimination against citizens in any law (which included the FC), inter alia, on the ground of gender, whereas the latter did not allow a Malaysian mother to pass her citizenship to her child who was born outside the Federation just because her husband was a non-Malaysian. It was blatantly discriminatory of the rights of the Malaysian mother. A harmonious and organic interpretation was therefore necessary to resolve the conflict between the provisions so that 'father' in s 1(b) of Part II of the Second Schedule of the FC was read in a non-discriminatory way to include 'mother' (see paras 233–239 & 255).

(14) **(per Nantha Balan JCA, dissenting)** Article 8(2) made it unconstitutional to practice gender discrimination by recognising the blood descent of the father but not that of the mother for purposes of according to citizenship by operation of law to a child born overseas. The organic method of constitutional interpretation ensured that the Citizenship provisions were read harmoniously with the Fundamental Liberties provisions so that no conflict or absurdity arose (see paras 252, 256 & 259).

(15) **(per Nantha Balan JCA, dissenting)** As part of the harmonious interpretative exercise, it was not just permissible, but necessary, for the court to refer to art 160(1) and s 2(94) of the 11th Schedule of the FC which dealt with the construction of the phrase 'masculine gender'. Section 2(94) provided that words importing the masculine gender included females. Thus, 'father' in s 1(b) of Part II of the Second Schedule could be interpreted to include 'mother' with the result that children

born overseas to Malaysian mothers whose husbands were foreigners were conferred Malaysian citizenship by operation of law (see paras 264 & 271).

(16) **(per Nantha Balan JCA, dissenting)** If the Government took the position that the gender discrimination presently countenanced in art 14(1)(b) read with s 1(b) of Part II of the Second Schedule of the FC was deliberate and should continue despite the 2001 amendment to art 8 which introduced the anti-gender discrimination provisions, then that intention should have been constitutionally legitimised via an amendment to art 8(5) to provide that art 8(2) shall not affect citizenship matters. Alternatively, art 14(1)(b) read with s 1(b) of Part II of the Second Schedule should have been amended to add a non-obstante clause to state 'Notwithstanding Article 8(2)' or words to that effect so that it was made clear that Parliament intended art 8(2) to not regulate or control the provisions relating to citizenship by operation of law. Since neither of these were done, Parliament must be deemed to have intended article 8(2) to apply to all discriminatory provisions found within the FC itself, unless the discriminatory provisions had been legitimised via art 8(5) or by a non-obstante clause (see paras 244, 270 & 285).

(17) **(per Nantha Balan JCA, dissenting)** Although legislative history and the historical reasons for legislation played an important role in interpreting and understanding a constitutional provision, it had to yield to later legislative developments. The gender-discriminating wording in art 14(1)(b) read with s 1(b) of Part II of the Second Schedule had to give way to the 2001 amendment to art 8 which was a fundamental rights provision that had an all-pervading influence or effect on the other parts of the FC. Following the amendment to art 8, it was no longer relevant or necessary to hark back to the thought processes or intentions of the original framers of the Constitution in interpreting the FC as doing so was antithetical to Malaysia's avowed intention of embracing CEDAW to which it had acceded, albeit with the reservation that it did not intend to abide by art 9(2) of CEDAW. The CEDAW reservations were essentially the product of political decisions of the government of the day and were not binding on the courts. Such reservation had no impact on the interpretation of art 14(1)(b) read with s 1(b) of Part II of the Second Schedule of the FC because it was both the function and constitutional duty of this court to interpret the constitutional provisions as they were presently worded. The government's reservations to CEDAW could not curtail the court's interpretative function (see paras 249 & 278–281).

[Bahasa Malaysia summary

Kedua-dua rayuan di sini adalah dari keputusan Mahkamah Tinggi yang bercanggah mengenai isu sama ada anak yang dilahirkan di luar negara hasil perkahwinan yang sah antara ibu warganegara Malaysia dan bapa bukan

warganegara Malaysia berhak mendapat kerakyatan Malaysia melalui undang-undang. Oleh kerana undang-undang terkini menyatakan bahawa, sekiranya bapa kanak-kanak tersebut adalah rakyat Malaysia, tanpa mengira siapa dia berkahwin, kanak-kanak tersebut secara automatik menjadi warganegara Malaysia melalui operasi undang-undang. Dalam Rayuan 273, perayu ('Mahisha') adalah anak yang sah kepada ibu warganegara Malaysia dan seorang bapa warganegara India. Dua adik beradik Mahisha — seorang abang dan seorang kakak — adalah warganegara Malaysia kerana mereka dilahirkan di Malaysia dan mematuhi peruntukan s 1(a) Bahagian II, Jadual Kedua Perlembagaan Persekutuan ('PP') untuk menjadi warganegara. Tetapi sejak dilahirkan di India, Mahisha dinafikan kewarganegaraan Malaysia walaupun dia secara rasmi memohon di bawah perkara 15(2) PP. Mahisha memfailkan saman pemula ('SP') untuk satu deklarasi bahawa: (a) berdasarkan kewarganegaraan ibunya, dia adalah warganegara Malaysia secara kuat kuasa undang-undang di bawah perkara 14(1)(b) dibaca bersama s 1(b), Bahagian II, Jadual Kedua PP; (b) bahawa perkataan 'bapa' di dalam s 1(b) tersebut hendaklah ditafsirkan untuk memasukkan 'ibu' atau salah seorang daripada ibu bapa; dan (c) bahawa kegagalan, keengganan atau peninggalan Kerajaan Malaysia untuk mengiktiraf beliau sebagai warganegara Malaysia melanggar peruntukan perkara 8 PP. Mahkamah Tinggi telah menolak permohonan Mahisha dengan menafsirkan perkataan 'bapa' dalam s 1(b) tersebut secara harfiah dengan tidak memasukkan perkataan 'ibu'. Sementara itu, dalam Rayuan 531, responden kedua hingga ketujuh adalah ibu warganegara Malaysia yang berkahwin secara sah dengan warga asing dan mempunyai anak yang dilahirkan di luar Persekutuan (responden pertama bertindak bagi pihak Persatuan Sokongan Keluarga & Kebajikan Selangor & Kuala Lumpur dan ahli-ahlinya). Seperti Mahisha, ibu-ibu responden telah memohon kewarganegaraan melalui pendaftaran untuk anak mereka yang lahir di luar negara menurut perkara 15(2) PP dan tidak berjaya. Melalui SP, responden memohon relif yang sama seperti Mahisha. Di samping itu, mereka memohon deklarasi bahawa ibu dan bapa warga Malaysia mempunyai hak yang sama berbanding pemberian kewarganegaraan melalui kuat kuasa undang-undang untuk anak-anak sah mereka yang dilahirkan di luar negara. Hal ini selaras dengan dengan perkara 8(2) PP yang menolak diskriminasi terhadap rakyat untuk sebarang undang-undang, antara lain, atas dasar jantina dan juga membolehkan Malaysia memenuhi kewajipannya di bawah Konvensyen Penghapusan Segala Bentuk Diskriminasi terhadap Wanita ('CEDAW') yang telah dipersetujui. Mahkamah Tinggi dalam Rayuan 513 membenarkan relif yang dipohon oleh responden. Dalam rayuan ini, Mahisha dan responden dalam Rayuan 531 berhujah bahawa 'bapa' dalam Bahagian II, Jadual Kedua PP harus ditafsirkan untuk memasukkan 'ibu'. Sebaliknya, Kerajaan Malaysia berhujah bahawa 'bapa' harus diberi makna yang jelas, biasa dan harfiah kerana pendraf Perlembagaan berniat sedemikian. Kerajaan menghujahkan bahawa satu-satunya masa 'bapa' dalam seksyen tersebut dibenarkan untuk ditafsirkan sebagai 'ibu' adalah apabila kanak-kanak tersebut adalah tidak sah taraf supaya

A B C D E F G H I

dia memperoleh kewarganegaraan ibu dan mengelak daripada menjadi seorang yang tidak mempunyai negara ('stateless').

Diputuskan, dengan majoriti membenarkan Rayuan 531 dan menolak Rayuan 273:

(1) **(oleh Kamaludin Md Said HMR, majoriti)** Kanak-kanak tersebut di dalam rayuan ini tidak berhak mendapat warganegara melalui kuat kuasa undang-undang menurut s 1(b), Bahagian II, Jadual Kedua PP kerana bapa mereka bukan warganegara Malaysia ketika kelahiran mereka. Mahkamah ini terikat dengan tafsiran yang diberikan kepada peruntukan tersebut oleh majoriti Mahkamah Persekutuan dalam *CTEB & Anor v Ketua Pengarah Pendaftaran Negara Malaysia & Ors* [2021] 4 MLJ 236 ('CTEB'). Pada masa ini, prinsip asas dalam *CTEB* yang diputuskan oleh majoriti adalah undang-undang yang perlu diikuti. Mahkamah Tinggi dalam Rayuan 531 terkhilaf apabila gagal meneliti penggunaan perkataan 'bapa' dalam peruntukan di atas oleh pendraf Perlembagaan adalah disengajakan dan bersifat sensitif. Ianya bukan bertujuan untuk memasukkan perkataan 'ibu'. Sebaliknya, Mahkamah Tinggi dalam Rayuan 273 adalah betul dalam tafsirannya menurut kes *CTEB* (lihat perenggan 11 & 43–44).

(2) **(oleh Kamaludin Md Said HMR, majoriti)** Perkataan 'bapa' di dalam s 1(b), Bahagian II, Jadual Kedua merujuk kepada bapa sahaja. Mahkamah tidak boleh memasukkan atau menafsir perkataan baru ke dalam s 1(b) untuk dibaca sebagai 'ibu' atau memasukkan 'ibu'. Frasa yang digunakan dalam s 1(a) dan 1(d) Bahagian II, Jadual Kedua ialah 'yang ibu bapa sekurang-kurangnya satu', yang bermaksud salah seorang ibu bapa. Oleh itu, penafsiran perkataan 'bapa' dalam s 1(b) adalah penting dan tidak dimaksudkan untuk dibaca sebagai ibu atau bapa atau salah seorang daripada mereka. Satu-satunya keadaan apabila 'bapa' dalam s 1(b) ditafsirkan bermaksud 'ibu' ialah apabila ianya membabitkan anak tidak sah taraf seperti yang diperuntukkan dalam s 17, Bahagian III Jadual Kedua (lihat perenggan 11–14).

(3) **(oleh Kamaludin Md Said HMR, majoriti)** Walaupun mahkamah mengambil maklum 'kesusahan' yang dihadapi oleh ibu-ibu kanak-kanak berkenaan, ianya tidak boleh, menurut penafsiran PP, memberi kuasa untuk membenarkan remedi untuk menangani 'kesusahan' tersebut dengan mengubah konteks sejarah dan falsafah peruntukan kewarganegaraan serta prinsip asas yang telah diterima sebagai sebahagian daripada PP. Perkara-perkara yang menyentuh isu moral dan sosial yang sensitif dan kontroversi sememangnya merupakan persoalan perundangan yang perlu diselesaikan oleh Parlimen (lihat perenggan 15–16 & 42).

(4) **(oleh Kamaludin Md Said HMR, majoriti)** Perkataan 'jantina'

dimasukkan dalam perkara 8(2) PP melalui Akta A1130 dengan halangan yang mana perkara 8(2) yang dipinda itu tidak terpakai untuk peruntukan kewarganegaraan di bawah Bahagian III PP. Daripada penelitian tersebut, adalah jelas bahawa Akta A1130 tidak bertujuan untuk mengubah atau menjejaskan operasi perkara 14 dan perkara 15 PP. Seksyen 1(b) dan 1(c) Bahagian II, Jadual Kedua tidak bercanggah dengan perkara 8(2) PP (lihat perenggan 32).

(5) **(oleh Kamaludin Md Said HMR, majoriti)** Kaedah tafsiran organik PP tidak terpakai di dalam kes ini. Tafsiran harmoni/organik perkataan 'bapa' dalam s 1(b) dan 1(c) Bahagian II, Jadual Kedua untuk memasukkan 'ibu' telah melanggar niat asas Akta A30 dalam meminda perkara 159(5) dan menjurus kepada pembuatan undang-undang kehakiman yang diluluskan Majlis Raja-Raja. Untuk menafsirkan s 1(b) dan 1(c) Bahagian II, Jadual Kedua menurut cara yang dinyatakan di atas bagi memenuhi keperluan masa kini ialah dengan meminda semula Perlembagaan tanpa terlebih dahulu mematuhi prosedur ketat yang ditetapkan dalam perkara 159 (lihat perenggan 39–40).

(6) **(oleh Azizah Nawawi HMR, majoriti)** Perkataan 'bapa' di dalam s 1(b), Bahagian II, Jadual Kedua PP hanya bermaksud bapa kandung dan tidak bermaksud 'ibu' atau 'ibu bapa'. Dalam rayuan ini, memandangkan bapa kandung kanak-kanak berkenaan bukan warganegara Malaysia, kanak-kanak tersebut tidak berhak mendapat kerakyatan Malaysia melalui kuat kuasa undang-undang di bawah perkara 14(1)(b) PP dibaca bersama s 1(b), Bahagian II, Jadual Kedua (lihat perenggan 149–150).

(7) **(oleh Azizah Nawawi HMR, majoriti)** Mahkamah Tinggi dalam Rayuan 531 melakukan kesilapan asas dalam membenarkan relif yang dipohon oleh responden. Mahkamah gagal mengambil kira keputusan majoriti Mahkamah Persekutuan dalam *CTEB* yang memutuskan bahawa 'bapa' dalam s 1(b), Bahagian II, Jadual Kedua merujuk kepada bapa kandung kanak-kanak tersebut dan hanya dalam keadaan tertentu di mana kanak-kanak tersebut tidak sah taraf, iaitu s 17 Bahagian III Jadual Kedua menafsirkan 'bapa' dalam s 1(b) bermaksud 'ibu'. Mahkamah Tinggi tidak boleh menafsirkan 'bapa' dalam s 1(b) sebagai termasuk 'ibu'. Berbuat demikian sama seperti meminda atau menulis semula peruntukan asas PP tanpa mengambil kira peranan Majlis Raja-Raja seperti yang ditetapkan di bawah perkara 159(5) PP (lihat perenggan 75, 79, 81 & 126–127).

(8) **(oleh Azizah Nawawi HMR, majoriti)** Majoriti Mahkamah Persekutuan di dalam *CTEB* memutuskan bahawa peraturan asas dalam menafsir PP adalah untuk memberi kesan kepada niat pendraf Perlembagaan. Pendraf dengan sengaja menggunakan perkataan yang berbeza di bahagian-bahagian peruntukan kewarganegaraan yang berlainan untuk bermaksud perkara yang berbeza — s 1(a), 1(d) dan 1(e)

Bahagian II, Jadual Kedua menggunakan frasa 'yang ibu bapanya sekurang-kurangnya', bermaksud sama ada bapa atau ibu; s 1(b) dan 1(c) Bahagian II hanya menggunakan perkataan 'bapa' manakala dalam s 17, Bahagian III Jadual Kedua, rujukan kepada 'bapa atau ibu atau bapanya' orang yang tidak sah taraf hendaklah ditafsirkan sebagai rujukan kepada 'ibunya'. Ini adalah satu-satunya masa status 'ibu' digunapakai. Malah, s 17 adalah jelas menunjukkan bahawa 'bapa' dalam s 1(b) dan 1(c) Bahagian II, Jadual Kedua hanya bermaksud bapa kandung dan tidak bermaksud atau memasukkan ibu kandung (lihat perenggan 85, 94–95 & 99).

(9) **(oleh Azizah Nawawi HMR, majoriti)** Tiada konflik yang jelas di dalam PP antara peruntukan kewarganegaraan dalam Bahagian III dan Kebebasan Asasi dalam Bahagian II. Peruntukan tersebut mempunyai kedudukan yang sama dan tiada sebarang peruntukan di dalam PP yang menyatakan bahawa Bahagian III tertakluk kepada Bahagian II. Perkara 8(2) PP tidak boleh diberi keutamaan berbanding perkara 14(1)(b) dibaca bersama s 1(b), Bahagian II, Jadual Kedua kerana semua peruntukan dalam PP mempunyai kedudukan yang sama antara mereka dan kedudukannya tidak rendah dengan yang lain (lihat perenggan 104 & 112).

(10) **(oleh Azizah Nawawi HMR, majoriti)** Tiada konflik yang dilihat antara perkara 8(2) dan perkara 14(1)(b) dibaca dengan s 1(b), Bahagian II, Jadual Kedua PP kerana pindaan perkara 8(2) tidak bertujuan untuk memberi kesan kepada peruntukan kewarganegaraan dalam Bahagian III PP. Majoriti Mahkamah Persekutuan dalam CTEB juga telah menjelaskan bahawa peruntukan anti diskriminasi jantina di dalam perkara 8(2) merupakan diskriminasi yang dibenarkan oleh PP, seperti dalam perkara 14, yang mana perkara 8(2) tidak boleh melindungi diskriminasi tersebut (lihat perenggan 133–134).

(11) **(oleh Azizah Nawawi HMR, majoriti)** Walaupun Malaysia telah bersetuju dengan CEDAW dan perkara 9(2) CEDAW telah menjadikan isu kesamarataan hak dalam artikel tersebut tidak boleh diguna pakai dalam menafsir peruntukan kewarganegaraan di dalam PP. Selain itu, tanpa kemasukan artikel Konvensyen tersebut ke dalam undang-undang tempatan oleh Akta Parlimen, peruntukan CEDAW tidak mempunyai kesan undang-undang yang mengikat (lihat perenggan 132, 146 & 148).

(12) **(oleh Azizah Nawawi HMR, majoriti)** Hujahan bahawa keputusan Mahkamah Persekutuan yang kemudiannya dalam *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar Bagi Kelahiran & Kematian, Malaysia* [2022] 1 MLJ 71 telah mengesahkan penghakiman minoriti kes *CTEB* dan menyebabkan keputusan majoriti dalam *CTEB* tidak lagi terpakai atau mengikat mahkamah ini adalah salah. Mahkamah di *CCH* tidak memutuskan

peruntukan PP yang sama seperti di dalam kes *CTEB* dan kedua-dua kes tersebut tidak bercanggah dengan undang-undang yang sama. Oleh itu, *CCH* tidak mengakas kes *CTEB* mengenai tafsiran perkara 14(1)(b) dibaca dengan s 1(b), Bahagian II, Jadual Kedua PP (lihat perenggan 136 & 144).

(13) **(oleh Nantha Balan HMR, menentang)** Jelas sekali terdapat konflik antara perkara 8(2) PP dan perkara 14(1)b) dibaca dengan s 1(b), Bahagian II, Jadual Kedua PP sebagaimana yang diperuntukkan untuk penghapusan diskriminasi terhadap warganegara dalam mana-mana undang-undang (termasuk PP), antara lain, atas alasan jantina, yang mana peruntukan kedua tidak membenarkan ibu warganegara Malaysia menyerahkan kewarganegaraannya kepada anaknya yang dilahirkan di luar Persekutuan hanya kerana suaminya bukan warganegara Malaysia. Ianya secara terang-terangan mendiskriminasi hak ibu Malaysia. Oleh itu, tafsiran yang harmoni dan organik diperlukan untuk menyelesaikan konflik tersebut supaya peruntukan 'bapa' dalam s 1(b), Bahagian II, Jadual Kedua PP dibaca dengan cara yang tidak diskriminasi untuk memasukkan 'ibu' (lihat perenggan 233–239 & 255).

(14) **(oleh Nantha Balan HMR, menentang)** Perkara 8(2) menjadikannya tidak berperlembagaan untuk amalan diskriminasi jantina dengan mengiktiraf keturunan darah bapa tetapi bukan ibu bagi maksud mengikut kewarganegaraan melalui pengoperasian undang-undang kepada anak yang dilahirkan di luar negara. Kaedah tafsiran organik perlembagaan memastikan bahawa peruntukan kewarganegaraan dibaca secara harmoni dengan peruntukan Kebebasan Asasi supaya tiada konflik atau kerumitan akan timbul (lihat perenggan 252, 256 & 259).

(15) **(oleh Nantha Balan HMR, menentang)** Sebagai sebahagian dari tafsiran harmoni, ianya bukan sahaja dibenarkan, tetapi perlu, untuk mahkamah merujuk kepada perkara 160(1) dan s 2(94) Jadual ke-11 PP berkaitan frasa 'jantina maskulin'. Seksyen 2(94) memperuntukkan bahawa perkataan yang mengguna pakai jantina maskulin termasuk perempuan. Oleh itu, 'bapa' dalam s 1(b), Bahagian II, Jadual Kedua boleh ditafsirkan untuk memasukkan 'ibu', maka anak-anak yang dilahirkan di luar negara melalui ibu-ibu Malaysia yang suaminya warga asing diberikan kewarganegaraan Malaysia melalui kuat kuasa undang-undang (lihat perenggan 264 & 271).

(16) **(oleh Nantha Balan HMR, menentang)** Sekiranya Kerajaan mengambil pendirian bahawa diskriminasi jantina pada masa ini diterjemah melalui perkara 14(1)(b) dibaca dengan s 1(b), Bahagian II, Jadual Kedua PP adalah disengajakan dan harus diteruskan walaupun pindaan perkara 8 pada tahun 2001 yang memperkenalkan peruntukan antidiskriminasi jantina, maka usaha tersebut sepatutnya disahkan secara perlembagaan melalui pindaan kepada perkara 8(5) untuk

memperuntukkan bahawa perkara 8(2) tidak akan menjejaskan perkara kewarganegaraan. Secara alternatif, perkara 14(1)(b) dibaca bersama s 1(b), Bahagian II Jadual Kedua hendaklah dipinda untuk menambah fasal yang tidak jelas untuk menyatakan 'Walau apa pun Perkara 8(2)' atau perkataan-perkataan yang berkuat kuasa itu supaya dijelaskan bahawa Parlimen berhasrat perkara 8(2) untuk tidak mengawal atau mengawal peruntukan yang berhubungan dengan kewarganegaraan melalui kuat kuasa undang-undang. Oleh kerana kedua-duanya tidak dilakukan, Parlimen mestilah dianggap mempunyai niat untuk perkara 8(2) untuk mengaplikasinya kepada semua peruntukan yang terdapat dalam PP itu sendiri, melainkan sekiranya peruntukan diskriminasi telah disahkan melalui perkara 8(5) atau oleh klausa yang tidak jelas (lihat perenggan 244, 270 & 285).

(17) **(oleh Nantha Balan HMR, menentang)** Walaupun sejarah perundangan memainkan peranan penting dalam menafsir dan memahami peruntukan perlembagaan, perkembangan perundangan selepas itu juga perlu diambil kira. Perkataan yang mendiskriminasi jantina dalam perkara 14(1)(b) dibaca dengan s 1(b), Bahagian II, Jadual Kedua tertakluk kepada pindaan 2001 kepada perkara 8 yang merupakan peruntukan hak asasi yang mempunyai pengaruh atau kesan menyeluruh ke atas bahagian lain PP. Berikutan pindaan perkara 8 itu, ianya tidak lagi relevan atau perlu untuk kembali kepada proses pemikiran atau niat pendraf asal Perlembagaan dalam menafsirkan PP kerana dengan berbuat demikian, adalah bercanggah kepada tujuan Malaysia menerima CEDAW yang telah disetujui, walaupun dengan syarat bahawa ianya tidak berniat untuk mematuhi perkara 9(2) CEDAW. Penerimaan CEDAW pada asalnya adalah hasil daripada keputusan politik kerajaan hari ini dan tidak mengikat mahkamah. Penerimaan tersebut tidak memberi kesan kepada tafsiran perkara 14(1)(b) yang dibaca bersama s 1(b), Bahagian II, Jadual Kedua PP kerana ianya merupakan fungsi dan tugas perlembagaan mahkamah ini untuk menafsirkan peruntukan perlembagaan seperti yang telah diperuntukkan sekarang. Kerajaan tidak boleh menyekat fungsi penafsiran mahkamah (lihat perenggan 249 & 278–281).]

Cases referred to

Abdullah bin Atan v PP and other appeals [2020] 6 MLJ 727; [2020] 9 CLJ 151, FC (refd)

AirAsia Bhd v Rafizah Shima bt Mohamed Aris [2014] 5 MLJ 318; [2015] 2 CLJ 510, CA (refd)

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1; [2019] 5 CLJ 780, FC (refd)

Bato Bagi & Ors Kerajaan Negeri Sarawak and another appeal [2011] 6 MLJ 297; [2011] 8 CLJ 766, FC (refd)

CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia [2022] 1 MLJ 71; [2022] 2 AMR 1; [2022] 1 CLJ 1, FC (distd)

CTEB & Anor v Ketua Pengarah Pendaftaran Negara & Ors [2018] 1 CLJ 671, HC (refd)

CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors [2020] 4 CLJ 597, CA (refd)

CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors [2021] 4 MLJ 236; [2021] 5 AMR 661; [2021] AMEJ 0708; [2021] 6 CLJ 471, FC (folld)

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1, FC (refd)

Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener) [2004] 2 MLJ 257; [2004] 2 AMR 317; [2004] 1 CLJ 701, FC (refd)

Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener) [2010] 2 MLJ 285; [2010] 2 CLJ 925; [2010] MLJU 30; [2010] 2 AMR 105, FC (refd)

Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors [2022] 3 MLJ 356; [2022] 5 CLJ 1, FC (folld)

Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545; [2018] 2 AMR 313; [2018] 3 CLJ 145, FC (refd)

James v Commonwealth of Australia and State of New South Wales and Others (Interveners) [1936] 2 All ER 1449, PC (refd)

Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 ILJ 135; [2012] 3 CLJ 577, FC (refd)

Kwan Ngen Wah & Anor v Julita bt Tinggal [2022] 4 MLJ 287, CA (refd)

Lee Kwan Woh v PP [2009] 5 MLJ 301; [2010] 2 AMR 231; [2009] 5 CLJ 631, FC (refd)

Lee Lee Cheng (F) v Seow Peng Kwang [1960] 1 MLJ 1; [1958] 1 LNS 32, CA (refd)

Leow Fook Keong (L) v Pendaftar Besar Bagi Kelahiran dan Kematian, Jabatan Pendaftaran Negara, Malaysia & Anor [2022] 1 MLJ 398; [2022] 1 AMR 23; [2021] AMEJ 1833; [2022] 1 CLJ 23, FC (folld)

Letitia Bosman v PP and other appeals (No 1) [2020] 5 MLJ 277; [2020] 8 CLJ 147, FC (refd)

Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)

Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750; [2021] 2 CLJ 579, FC (refd)

Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa & 2 Lagi (Criminal Appeal No 05 (HC)-7–01 of 2020), FC (refd)

Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors [2012] 1 MLJ 832, HC (refd)

Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor (applying on their behalf and as litigation representatives for Pang Cheng Chuen,

a child) [2017] 3 MLJ 308, CA (refd)
Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar [2020] 1 MLJ 141, FC (refd)
PP v Sihabduin bin Haji Salleh & Anor [1980] 2 MLJ 273; [1981] CLJ Rep 82, FC (refd)
Regina (Nicklinson) and another v Ministry of Justice and others (CNK Alliance Ltd and others intervening); Regina (AM) v Director of Public Prosecutions and others (CNK Alliance Ltd and others intervening) [2015] AC 657, SC (refd)
Romein v Advocate General for Scotland [2018] 2 All ER 849; 2018 SLT 790; [2018] 2 WLR 672; 2018 SC (UKSC) 122; [2018] AC 585; [2018] UKSC 6; [2018] WLR(D) 84, SC (refd)
Tai Chai Yu v The Chief Registrar of The Federal Court [1998] 2 MLJ 474, CA (refd)
Tan Kim Hock Product Centre Sdn Bhd & Anor v Tan Kim Hock Tong Seng Food Industry Sdn Bhd [2018] 2 MLJ 1; [2018] 2 CLJ 567; [2018] 1 MLRA 631; [2018] 1 AMR 621, FC (refd)

Legislation referred to

Constitution of the Republic of Singapore [SG] art 122, 122(1), (1)(b)
Federal Constitution arts 3, 4(1), 5, 5(1), 6, 7, 8, 8(1), (2), (5), (5)(a), (5)(b), (5)(c), (5)(d), (5)(e), (5)(f), 9, 10, 10(4), 11, 12, 12(4), 13, 14, 14(1)(b), 15, 15(2), (3), 15A, 16, 16A, 17, 18, 19, 22, 31, 38, 63(4), 70, 71(1), 72(4), 150, 150(6), (6A), 152, 153, 153(2), (8), (8A), 159, 159(3), (5), 160, 160(1), 161A(5), Second Schedule, Part II, ss 1, 1(a), (b), (c), (d), (e), 2(3), Part III, ss 17, 18, 19, 19A, 19B, 19C, 20, 21, 22, Eleventh Schedule, s 2(94)
Islamic Family Law (Federal Territories) Act 1984
Local Government Act 1976 s 16(4)
Malaysia Act 1963 [UK]
Public Officers (Conduct and Discipline) Municipal Council of the Province Wellesley Regulations 1995 reg 25(2)
Societies Act 1966

Appeal from: *Suriani Kempe (President and office bearer of Persatuan Kebajikan Sokongan Keluarga Selangor & Kuala Lumpur (Family Frontiers)) & Ors v Kerajaan Malaysia & Ors* [2021] MLJU 1864 and *Suriani Kempe (President and office bearer of Persatuan Kebajikan Sokongan Keluarga Selangor & Kuala Lumpur (Family Frontiers)) & Ors v Kerajaan Malaysia & Ors* [2021] 12 MLJ 558 (High Court, Kuala Lumpur)

Cyrus V Das (with Raymond Mah Mun Kitt, Jasmine Wong Kah Man and Eric Toh Kah Yung) (Mah Weng Kwai & Assoc) in Civil Appeal No W-01(A)-273–06 of 2020 for the appellant.
Liew Horng Bin (Attorney General's Chambers) in Civil Appeal No W-01(NCVC)(A)-531–09 of 2021 for the appellants.

Ahmad Hanir bin Hambaly (with Mohammad Sallehuddin bin Md Ali) (Attorney General's Chambers) in Civil Appeal No W-019A)-273-06 of 2020 for the respondent.

Gurdial Singh Nijar (with Ngeow Chow Ying, Gan Pei Fern, Joshua Andran, Loh Suk Hwa, Abraham Au and Denishia Rajendran) (Joshua Alvin Khoo & Yong) in Civil Appeal No W-01(NCVC)(A)-531-09 of 2021 for the respondent.

Kamaludin Md Said JCA:

INTRODUCTION

[1] There are two appeals fixed before this court.

(a) Appeal No W-01(NCVC)(A)-531–09–2021 ('Appeal 531'); and

(b) Appeal No W-01(A)-273–06 of 2020 ('Appeal 273').

[2] In Appeal 531, the appellant, Government of Malaysia ('Government') is appealing against the decision of the High Court at Kuala Lumpur dated 9 September 2021 which granted citizenship to the respondents' children by operation of law under the Federal Constitution. The respondents are collectively 'Mothers'.

[3] In Appeal 273, Mahisha Suhaila Abdul Majeed, the appellant ('Mahisha') is appealing against the decision of the High Court at Kuala Lumpur dated 21 May 2020 which had dismissed her application for citizenship by operation of law under the Federal Constitution. The respondent is the Government.

[4] Both appeals contain two conflicting decisions of the High Court on the interpretation of art 14(1)(b), Part II, s 1(b) of the Second Schedule of the Federal Constitution based on the same undisputed facts of children born overseas/outside Malaysia whose mothers are married to foreign spouses. Mahisha was born in India whose mother is a Malaysian citizen and father is an Indian citizen. Mothers are Malaysian citizens, fathers are foreign citizens and their children were born in wedlock abroad. It is not disputed that Mahisha and Mothers' children had all acquired citizenship following their non-citizen fathers' nationality. In other words, none of them are without a citizenship or stateless.

[5] Citizenship by operation of law is provided under art 14(1)(b) read together with s 1(b) and (c) of Part II of the Second Schedule of the Federal Constitution which provides as follows:

14 CITIZENSHIP BY OPERATION OF LAW

A (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:

(a) ...

(b) every person born before or after Malaysia Day, and having any of the
B qualifications specified in Part II of the Second Schedule.

PART II

CITIZENSHIP BY OPERATION OF LAW OF PERSONS BORN ON OR AFTER MALAYSIA DAY

C (1) Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:

(a) ...

(b) every person born outside the Federation *whose father* is at the time of the
D birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State; and

(c) every person born outside the Federation *whose father* is at the time of the birth a citizen and whose birth are, one year of its occurrence or within such longer period as the Federal Government may in any particular case
E allow, registered at a consulate of the Federation or, if it occurs in Brunei or in territory prescribed for this purpose by order of the Yang Di-Pertuan Agong, registered with the Federation;

F **[6]** The issue raised in both appeals are common issue on the interpretation of art 14(1)(b) read together with the Second Schedule, in s 1(b) and (c) of Part II of the Federal Constitution.

DECISIONS OF THE HIGH COURTS

G **[7]** The High Court in Appeal 273 dismissed Mahisha's originating summons on ground that art 14(1)(b), Part II, s 1(b) of the Second Schedule of the Federal Constitution does not apply to her on reason that at the time of birth, her father is an Indian Citizen. The word 'father' in Part II, s 1(b) of the
H Second Schedule of the Federal Constitution must not be construed as one of her parents ie father or mother. The framers of the Constitution did not use the words 'whose parents one at least' in s 1(b) to show that it refers to either parents as provided in s 1(a) and 1(d) Second Schedule of the Federal Constitution. The word 'father' in s 1(b) has significance. It is very clear it
I specifically refers to father only and not intended to read as mother or father or either one of them. In other words, the High Court applied the literal interpretation of the word 'father' in art 14(1)(b), Part II, s 1(b) of the Second Schedule of the Federal Constitution means 'father' as provided for. The words 'father' is not or could never be interpreted as mother or to include mother.

[8] The court in Appeal 531 adopted the purposive and harmonious approach to give effect to the amendment made by Parliament in 2001 to art 8 of the Federal Constitution which explicitly prohibit discrimination against citizens based or gender or in other words, art 8(2) does not exclude or provide exception to any discrimination against citizens based on gender. Therefore, the words 'father' in art 14(1)(b), Part II, s 1(b) of the Second Schedule of the Federal Constitution must be read as either father or mother of the children born outside the Federation. The High Court held that the existing provision is gender bias and has the discriminating effect on the mother. By invoking art 8(2) of the Federal Constitution that 'father' includes mother without any amendment made to the said provision to define 'father' to be read as either mother or father, art 14(1)(b), Part II, s 1(b) of the Second Schedule is harmonised and take away the discriminating effect.

MY ANALYSIS/DECISION

[9] Prior to this landmark decision by the High Court in Appeal 531, it has been decided in many cases that children who were born outside Malaysia whose mothers are married to foreign spouses, their citizenship follow the citizenship of the father. The courts have adopted a literal interpretation when dealing with the impugned provisions. The decision of the High Court in Appeal 273 also followed this approach. The courts agreed with the Government's stand that the word 'father' in art 14(1)(b), Part II, s 1(b) of the Second Schedule of the Federal Constitution is so clear that it would not require further explanation or different reading into it by other mode of interpretation. To do that means changing the basic feature of art 14(1)(b), Part II, s 1(b) of the Second Schedule of the Federal Constitution which was never intended by the framers of the Constitution. It is intended that citizenship by operation of law of children born on or after Malaysia Day must follow the status of the father at the time of birth of the children.

[10] I noted that in Appeal 273, the High Court's approach of construction on the impugned provision is similar with the Federal Court's decision in *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 4 MLJ 236 ('CTEB'). In *CTEB*'s case, the child was born outside the Federation, hence, art 14(1)(b) applies to him. The Federal Court by majority decision pronounced that the word 'father' in art 14(1)(b), Part II, s 1(b) of the Second Schedule of the Federal Constitution must be read in its proper context. The majority decision clearly states that the citizenship by operation of law in the Federal Constitution under art 14(1)(b) read together with the Second Schedule, s 1(b) and (c) of Part II of the Federal Constitution must be read as a whole and to be given a straightforward plain meaning. It is improper to interpret one provision of the Federal Constitution in isolation from the others. To half read the provision by ignoring that s 1 must be read 'Subject to the provisions of Part III' is to deny the clearly express terms of the Federal

Constitution. *The fundamental rule in interpreting the Federal Constitution or any written law is to give effect to the intention of the framers. The court cannot insert or interpret new words into the Federal Constitution. The court may only call in aid other canons of construction where the provisions are imprecise, protean, and evocative or can reasonably bear more than one meaning* (at paras 38–40, and 46–48).

[11] In the present appeals, the children were born outside Malaysia from Malaysian mothers and foreign fathers. The Federal Court's construction of s 1(b) applies to the child in the present appeals. It means, the word, father in s 1(b) of Part II of the Federal Constitution, it refers to father only. The court cannot insert or interpret new words into s 1(b) of Part II of the Federal Constitution to be read as 'mother' or to include mother. It must be noted that the words 'whose parents one at least' in ss 1(a) and 1(d) show that it refers to either parents. However, the word 'father' in s 1(b) is used instead of the words 'whose parents one at least'. The word 'father' must have its significant and is not intended to read as mother or father or either one of them.

[12] The historical background is important in determining the clear intention of the framers of the Constitution. It is well-established that a Constitution must be interpreted in light of its historical and philosophical context, as well as its fundamental underlying principles. This is because every utterance must be construed in its proper context, considering the historical background and the purpose for which the utterance was made. The background of a Constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account (see *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780). In *CTEB*'s case, it was also held that besides defying the basic premise that citizenship by operation of law requires no application, the grammatical construction suggested is wholly irrelevant for yet another reason. Between the grammatical interpretation approach and the legislative history of the constitutional provisions, the latter outweighs the former. Legislative history plays an important role in interpreting and understanding the context of a constitutional provision (at para 76).

[13] The legislative history of art 14(1)(b), s 1(b) of Part II of the Second Schedule of the Federal Constitution will show the real intention of the framers of the Constitution. The relevant historical documents of Reid constitutional Commission show the process of how the current art 14(1)(b), s 1(b) of Part II of the Second Schedule of the Federal Constitution come into existence. Legislative history suggests that any person born anywhere outside Malaysia after the declaration of independence and whose father at the time of the child's birth is a national should be eligible to become a national. In the draft

provisions on citizenship dated 4 October 1956 prepared by Sir Ivor Jennings, where relevant, much emphasis was placed on the status description of 'father': In any event, when interpreting the provision, the Federal Court in *CTEB*'s case has considered the legislative history of art 14(1)(b), s 1(b) of Part II, Second Schedule.

[14] The only circumstance where the word 'father' is construed as 'mother' is provided under s 17, Part III of the Federal Constitution in respect of an illegitimate child. This also contained in the proposed draft approved by the Reid Commission. The Report of the constitutional Commission Working Party (CSY 56/43) also suggested that a minor child of a citizen who does not become citizen by operation of law, should have recourse under art 15(3) of the Constitution.

[15] The High Court in Appeal 531 adopted the liberal interpretation because the court was concerned with the 'grievances' faced by the 'mother' as being 'real' which include 'enrolment into school, additional expenses in education, health care and many other problems as mentioned in the judgment. I too share the same concern however, in my view the court cannot readily empowered itself to find a remedy to address the 'grievances' by altering the historical and philosophical context, as well as its fundamental underlying principles and which had been accepted as integral part of the Constitution provided under art 14(1)(b), s 1(b) of Part II of the Second Schedule of the Federal Constitution.

[16] I find the opinion of the High Court that Parliament does not take any conscious effort to discriminate between the mother and father in granting citizenship is bare statement, without basis and clearly wrong. It was held in *CTEB* at para 85, that the whole issue begs the question of whether the Judiciary in the exercise of its judicial duty is constitutionally empowered to ignore or neglect the clear dictates of the Federal Constitution. Similarly, can the High Court in this case ignore the legislative provision to overcome the grievances faced by mothers in the name of progressive construction of the Federal Constitution?

[17] The majority in *CTEB*'s case held that, art 14(1)(b), Part II, s 1(b) of the Second Schedule of the Federal Constitution must be read in its proper context ie to read as a whole and to be given a straightforward plain meaning. In this context, the word 'father' in s 1(b) of the Second Schedule is very clear, it specifically refers to father only and is not intended to read as mother or father or either one of them. The fundamental rule in interpreting the Federal Constitution or any written law is to give effect to the intention of the framers. It seems that the High Court rejected this interpretation and went against *CTEB*'s approach by saying that if this approach is adopted the court's role will

be downgraded to rubberstamping the provision as enacted without addressing the mind to the actual purpose the provision was enacted or applying the provision in a fair and just manner. In my considered view and with due respect to the learned judge, the actual purpose of which the provision is enacted is very clear that citizenship by operation of law is only granted to any person born outside Malaysia whose father at the time of the child's birth is a citizen. The word, 'father' refers to father only and does not include 'mother'. In my view, the court should not question why the law was enacted or whether Parliament had addressed its mind in enacting the law but the court's duty is to interpret the enacted law accordingly.

[18] In *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277; [2020] 8 CLJ 147, Azahar Mohamed CJ (Malaya), at para 95 held that controversial matters of policy involving differing views on the moral and social issues involved is inherently a matter for determination by the elected Legislature rather than the court. This issue has been considered in the recent case of *Regina (Nicklinson) and another v Ministry of Justice and others (CNK Alliance Ltd and others intervening); Regina (AM) v Director of Public Prosecutions and others (CNK Alliance Ltd and others intervening)* [2015] AC 657 ('R (Nicklinson)'). At para 96, His Lordship fully agreed with the views of Lord Sumption that generally, matters concerning sensitive and controversial moral and social issues are inherently legislative questions, calling for the representatives of the general body of citizens to decide on them. As he observed, the parliamentary process is a better way of resolving issues involving controversial and complex questions of fact arising out of moral and social dilemmas.

[19] The High Court in finding a remedy to the grievances of Mothers, applied other modes of interpretation and theories because it said the government fails to enact the provision in a fair and just manner. In my view, the provision must be read in its proper context and not whether the provision is not fair and unjust to the grievances raised by Mothers. We must not forget that there are laws including procedural law which may not be fair and just to men as well. Laws are enacted based on the scheme of government in accordance with certain moral and political values. It was said in *CTEB*'s case that it is the doctrine of separation of powers which forms the basis of our democratic nation that deserves our attention and respect. There is no judicial supremacy articulated in our Federal Constitution, and the power to amend the Constitution rests solely with Parliament by virtue of art 159. The court cannot at its own whims and fancies attempt to rewrite the clear written text of the Federal Constitution because it would only lead to absurdity (para 89).

[20] The remedy of the 'grievances' is provided under art 15(2) of the Federal Constitution which allows any person under the age of 21 years of whose

parents one at least is a citizen to be registered as a citizen upon application to the Federal Government by his parent or guardian. In this context, Mothers can apply for citizenship of their children. The remedy under art 15(2) is a fair and just remedy. The policy of the government is clear. Mothers' problems are actually against the approving authority which often rejected the applications and/or the conferment of citizenship under the said application is discretionary and allegedly tedious, takes an inordinately prolonged period for processing. The grievances are not against the existing law of art 15(2) of the Federal Constitution which provides the remedy but against the approving authority or the system which is currently in place which Mothers complained of. The system can be improved or changed. I agree this issue needs to be addressed by the relevant authority. It is also my view that the High Court when applying the existing law and policy already in force in a manner to find a remedy to the grievance of the Mothers as in this case by interpreting the word, 'father' to be read as 'mother' to remedy the grievances, is in fact re-writing the law in relation to the grant of citizenship to a child born outside the federation.

[21] It was submitted that the majority dictum in *CTEB* is therefore no longer applicable nor binding on this court as a later Federal Court decision *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia* [2022] 1 MLJ 71 ('CCH') has set out the proper approach to constitutional interpretation of citizenship provisions. In my view, *CCH*'s case was dealing with the issue that the child is entitled to citizenship under s 1(e) of Part II. It was suggested that the said s 1(e) which is only qualified by s 2(3) of Part II, s 19B of Part III and other related sections were inserted by the constitutional amendments effected through the Malaysia Act 1963 to guard against statelessness. Weeding out statelessness have been discussed in great length. The Federal Court adopts the reasoning which eventually recognised the exposed children's right to citizenship by harmonising the provision. The Federal Court was of the considered view that the child in this case is entitled to citizenship by operation of law pursuant to s 1(a) of Part II read together with s 19B of Part III (at 42).

[22] The facts in *CCH*'s case is related to abandoned or exposed children. The Federal Court held that the broadest possible interpretation of the word 'found exposed' is to accord it a meaning to include a child abandoned at the place of birth by the birth mother whose identity is unknown. However, the facts and issues in the present case are different and therefore can be distinguished. The issue in *CCH*'s case in my view, is not whether the word 'father' under art 14(1)(b), Part II, s 1(b) of the Second Schedule of the Federal Constitution ought to be construed as mother or include mother. The interpretation is not related to s 1(b) of the Second Schedule of the Federal Constitution but to s 1(a) of Part II read together with s 19B of Part III. More importantly, the Mothers are legally married to foreign spouses and their

children were born in wedlock abroad. As alluded to earlier, these children had all acquired citizenship following their non-citizen father's nationality or without a citizenship or stateless.

[23] I find the decision in *CTEB*'s case is in direct reference to citizenship by operation of law provisions in Part II of the Federal Constitution where the majority held that in defining the word 'parents' in s 1(a) giving a plain and ordinary meaning must refer to lawful parents. In the same light, the word 'father' in s 1(b) must also refer to a father in a valid marriage. In addressing the issue, the majority decision clearly states that the citizenship by operation of law in the Federal Constitution under art 14(1)(b) read together with the Second Schedule, in s 1(b) and (c) of Part II of the Federal Constitution must be read as a whole and to be given a straightforward plain meaning. It means, s 1(b) and (c) of Part II of the Federal Constitution is not discriminatory provision and cl 2 of art 8 of the Federal Constitution cannot be read into s 1(b) and (c) of Part II of the Federal Constitution.

[24] It is clear to me that the framers of the Constitution ascribed distinct meaning to the word 'father' as used in s 1(b) and 1(c) of Part II of the Second Schedule. The word 'father' is contrasted with the other qualification ie 'whose parents one at least' as in the case of s 1(a) and 1(d). 'Mother' as a qualification only comes into play in the limited context of illegitimacy as expressly provided in s 17 of Part III Second Schedule. The impugned provision is so clear that it would not require further explanation or different reading into it by other mode of interpretation. To do that means changing the basic feature of art 14(1)(b), Part II, s 1(b) of the Second Schedule of the Federal Constitution which was never intended by the framers of the Constitution.

[25] Section 2(94) of the 11th Schedule of the Federal Constitution provides that the words importing the masculine gender shall include females. In my view, there are other provisions provided in the Constitution that the words refer to male gender, the words 'he', 'him' and 'his' are used. The words can also be referred to 'she' or 'her' respectively. The words 'father' does not only confine to male gender but it is more specifically refer to 'male parent' otherwise the framers of the Constitution would have used the words 'whose parents one at least' in s 1(b) and 1(c) Second Schedule of the Federal Constitution.

[26] In *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545, the issue relates to art 12(4) which says that the religion of a person under the age of 18 years shall be decided by his *parent*. It was decided that the word, 'parent' should include both parents. On the facts of this case, it was submitted that the words, 'father' in s 1(b) of the Second Schedule, which refers to the masculine gender, would also include 'mother'. The case cited here in my view is not directly related or relevant to art

14(1)(b), s 1(b) of Part II of the Second Schedule which is in issue. It was also held in that case that the construction approach is only applicable to art 12(4) (see para 150). Further, art 14(1)(b), s 1(b) of Part II of the Second Schedule specifically uses the word 'father' and not parent however, the words 'parents' in plural and not 'parent' appear in s 1(a) and (d) ie 'whose *parents* one at least'. In *CTEB*'s case at para 68, the Federal Court held that the word 'parents' in s 1(a) is not defined in the Federal Constitution The plain and ordinary meaning of the word. *Black's Law Dictionary Abridged* (6th Ed) (Centennial Edition 1891–1991) defines the word 'parent' to mean 'the lawful father or mother of a person'. Therefore, in defining the word 'parents' in s 1(a) giving a plain and ordinary meaning must refer to lawful parents. In the same light, the word 'father' in s 1(b) must also refer to a father in a valid marriage.

[27] It was submitted that the Federal Constitution provides that all persons are equal before the law and there shall be no discrimination among others on the ground of gender. The principle of gender equality is enshrined in art 8 of the Federal Constitution. The word 'gender' was incorporated into art 8(2) of the Federal Constitution vide s 3 of the Constitution (Amendment) (No 2) Act 2001. The amendment which came into force on 28 September 2001 was to comply with Malaysia's obligation under the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW'). Following this and since the Government acceded to CEDAW on 5 July 1995, Malaysian courts have recognised women's rights and upheld the principle of equality and gender diversity via art 8 of the Federal Constitution.

[28] Article 8 of the Federal Constitution which reads as follows:

> 8 Equality
>
> (1) All persons are equal before the law and entitled to the equal protection of the law.
>
> (2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or *gender* in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.
>
> (3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State ...

[29] It is not in dispute that the Government did not compromise its stands of non-ratifying art 9(2) of CEDAW and retain its reservation on art 9(2). Article 9(2) says that 'Parties shall grant women equal rights with men with respect to the nationality of their children'. Unlike Singapore which had amended its Constitution after lifting its reservation to art 9(2) of CEDAW with respect to nationality rights vide Amendment Act of 12/2004, amended

art 122(1)(b) of its Constitution recognising a person born outside Singapore to be a citizen of Singapore *at the time of his birth, either his father or mother is a citizen* of Singapore (see *constitutional law in Malaysia and Singapore* (3rd Ed) Kevin YL Tan and Thio Li-Ann at pp 1347–1349).

[30] It was argued that the words 'Except as expressly provided by this Constitution, there shall be no discrimination ...' in cl (2) of art 8 of the Federal Constitution is very significant and important. There is no express clause to authorise discrimination or something similar to cl (5) of art 8 to expressly say that art 8 does not invalidate or prohibit matters described under paras (a)–(f). Since there is no express authorisation for discrimination of art 14(1)(b), therefore, it is discriminatory and by invoking or reading harmoniously with the principle of gender equality enshrined in art 8 of the Federal Constitution the word 'father' in art 14(1)(b) must be read as mother or include mother. The purpose for the incorporation of 'gender' in art 8(2) of the Federal Constitution is to show that women are not discriminated.

[31] In my view, the answer can be found in *CTEB*'s case. Having referred to art 8(1) and (2) of the Federal Constitution, the Federal Court held that FC is not a form of discrimination that art 8 seeks to protect. There are in fact a number of discriminatory provisions expressed in the FC which include art 14. Since the discriminatory effect of art 14 is one authorised by the FC, it would be absurd and clearly a lack of understanding of art 8 for any attempt to apply the doctrine of reasonable classification to art 14 (at para 85). Her Ladyship has considered the views expressed by some constitutional book writers and even though in full agreement with the views expressed that the provisions on citizenship are gender bias in that it emphasises on the citizenship of the father and not the mother, this whole issue begs the question of whether the Judiciary in the exercise of its judicial duty is constitutionally empowered to ignore or neglect the clear dictates of the FC and overcome that authorised gender bias in the name of progressive construction of the FC. Since the FC discriminates between a legitimate and an illegitimate child, a father and a mother of an illegitimate child, can the court alter that discrimination so as to keep the FC dynamically alive in order to avoid it from being locked and fossilised in 1963 (paras 86–88).

[32] Article 14(1)(b), Part II of s 1(b) is not gender discrimination against women. The word 'gender' was inserted in art 8(2) of the Federal Constitution vide Act A1130 with an express caveat that the amended art 8(2) of the Federal Constitution shall not apply to provisions on citizenship under Part III of the Constitution. In Hansard dated 1 August 2001 at p 74, the Minister clearly stated that citizenship matters are very complex and shall not touch it at the moment because the specific provision under the citizenship law requires specific and detailed studies. There were suggestions in the debate that in order

to eliminate discrimination against women under arts 14 and 15, the provisions must be amended together with art 8. Following this, and in the context of the word, 'father' in art 14(1)(b), s 1(b) and 1(c) of Part II of the Second Schedule for example, must be amended to give effect to art 8(2). From the debate, it was clear that Act A1130 which introduced the word 'gender' in art 8(2) was not intended to alter or affect the operation of arts 14 and 15 of the Constitution, it follows that there can be no conflict between s 1(b) and 1(c) of Part II of the Second Schedule with art 8(2) of the Federal Constitution.

[33] In *Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors* [2022] 3 MLJ 356, the Federal Court held that the FC recognises, embraces and encompasses the concept of the basic structure or fundamental legal structure of the Federal Constitution. The fundamental blueprint of the Constitution is safeguarded, as laws inconsistent with it are void (para 120). At para 123 it says that the supremacy and priority of the FC sets boundaries to constitutional amendment. The FC contains the basic or fundamental features that are essential for forming the state and society. It is these fundamental features that should therefore give structure and direction to the enactment of laws and for the administration of those laws. *It continues at para 123 by saying that the basic features of the FC, such as art 3 of the FC relating to religion, the fundamental liberties in Part II of the FC, citizenship of the state, the role of the YDPA and the Malay rulers as the heads of religion, the division of power between the Executive, Legislature and the Judiciary with the YDPA at the head, all comprise the basis on which the state and social order was prescribed, which are central and fundamental to the peace and stability of the nation*. The content of the FC therefore ensures permanence, validity and durability to the basis of governance in the state (para 124). And at para 125 it says that this is not to say that constitutional amendment is forestalled. *On the contrary, constitutional amendment may well be required for desirable development and for constitutional improvement. However, this cannot be extended to fundamental provisions or the essential features of the Constitution, as there would then result a new Constitution rather than constitutional improvement.*

[34] The Federal Court also speaks about the legal rationale for imposing limits to constitutional amendments. At para 187 it says that the net result of the acceptance of the basic structure doctrine as contained in art 4(1) of the FC, is that there are limits to the amendment power of Parliament. The Constitution therefore circumscribes the boundaries beyond which an amendment would fail. Put another way, an amendment which contravenes the Constitution as a whole would not succeed. It continues at para 192 that the basis for art 4(1) of the FC is premised on the footing that a constitutional amendment that seeks to vary or alter irrevocably an essential feature or structure of the FC or which alters the manner in which power is divided under the Constitution, would amount to an inconsistency which precludes such an

amendment from taking effect. The underlying rationale for that is clear. Such a constitutional amendment would have the effect of putting into place a new Constitution altogether. That is clearly contrary to the spirit, purpose and object of the FC itself.

[35] The principle in *Dhinesh*'s case is affirmed in another Federal Court case of *Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa & 2 Lagi* (Criminal Appeal No 05 (HC)-7–01 of 2020). The SFC argued that following *Dhinesh*'s case, amendment therefore, cannot be extended to fundamental provisions or the essential features of the Constitution as any amendment would result a new Constitution rather than constitutional improvement. SFC further submitted that art 8 is a fundamental provision, therefore, following the principle enunciated in *Dhinesh*'s case, it is clear that the provision cannot be amended or amendment for desirable development could never took place. The same would apply to citizenship provisions. By amending art 8(2) it has the effect of putting into place a new Constitution.

[36] The SFC raised a very pertinent point. I agree with his submission however, art 8(2) was amended and the issue on the limit to constitutional amendment raised is a different issue. In my view, the proposed inclusion of the word 'gender' in art 8(2) of the Federal Constitution, the Parliamentary debate revolved predominantly on other aspect of appointment to public office or relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment. It does not include citizenship matters.

[37] I find the issue at hand in the present appeal is similar in *CTEB*'s case. The discussion relates to citizenship by operation of law under art 14(1)(b) read together with the Second Schedule, in s 1(b) and (c) of Part II of the Federal Constitution which the majority held that s 1(b) and (c) of Part II of the Federal Constitution must be read as a whole and to be given a straightforward plain meaning. Whereas, in *CCH*'s case, the discussion relates to s 1(a) of Part II read together with s 19B of Part III of the Federal Constitution. Section 1(a) of Part II, relates to person born *within* the Federation 'whose parents one at least' is at the time of the birth either a citizen or permanent resident in the Federation. In the present case the children are born *outside* the Federation of which s 1(b) applies.

[38] One of the view by the majority in *CTEB*'s case is that the power to amend the Constitution rests solely with Parliament by virtue of art 159. It further said that the court cannot at its own whims and fancies attempt to rewrite the clear written text of the FC because it would only lead to absurdity. The significance of art 159 as alluded to by the Federal Court in *CTEB* must be considered in the broader constitutional and historical context. Article 159(5)

says that a law making an amendment to cl (4) of art 10, any law passed thereunder, the provisions of Part III, arts 38, 63(4), 70, 71(1), 72(4), 152, or 153 or to this clause shall not be passed without the consent of the Conference of Rulers. Applying the Federal Court in *Dinesh*'s case, the fundamental liberties in Part II of the FC and citizenship of the state are the basic features of the Federal Constitution which are central and fundamental to the peace and stability of the nation. constitutional amendment cannot be extended to fundamental provisions or the essential features of the Constitution, as there would then result a new Constitution rather than constitutional improvement.

[39] In the present case, the High Court applied the organic theory to meet the needs of current times. It is my considered view that a harmonious/organic interpretation of the word 'father' as appears in s 1(b) and 1(c) of Part II of the Second Schedule to include 'mother' is a clear violation of the underlying intention of Act A30 which amended art 159(5). The High Court in applying a harmonious/organic interpretation was in actual fact a judicial legislation to amend s 1(b) and 1(c) of Part II of the Second Schedule, by-passing the Conference of Rulers. The original intention of the framers of the Constitution is clear, and in light of the entrenched nature of citizenship provisions under Part III of the Constitution, the organic theory of interpretation has no application in the present case.

[40] Different considerations apply to a written instrument like the Convention (in our case, the Constitution), which records not just an agreement between states but the limits of that agreement. The function of a court dealing with such legislation is essentially interpretive and not creative. Judicial law-making following the 'living instrument' interpretation would lead to 'democracies decline' (see Lord Sumption in his lecture 'The Limits of Law' on 20 November 2013 at the Sultan Azlan Lecture at pp 7–8). For the same reasons in relation to harmonious interpretation, to interpret s 1(b) and 1(c) of Part II of the Second Schedule 'to meet the needs of current times' is to re-write the Constitution without first complying with the onerous procedures laid down in art 159.

[41] Given the undoubted intention of the framers of the Constitution in relation to the use of the word 'father' in s 1(b) and 1(c), the High Court is not well-placed in a position 'to find a remedy to address the grievances of the Mother in Appeal 531'. In other words, the interpretation accorded by the High Court in s 1(b) and 1(c) of Part II, Second Schedule is clearly wrong.

[42] The fundamental importance of these provisions, the importance of entrenching and guaranteeing the rights thereunder, and the need to remove them from the realm of public discussion which could lead to the exploitation of these issues by irresponsible elements to the detriment of all the people. The

careful and balanced provisions of the Constitution guaranteeing legitimate interests of all races in Malaysia are the very foundation upon which this nation exists. To challenge them is to challenge the very principle upon which the nation rests (see Hansard of 23 February 1971 at pp 57–58). It is reiterated here that matters concerning sensitive and controversial moral and social issues are inherently legislative questions, calling for the representatives of the general body of citizens to decide on them. The parliamentary process is a better way of resolving issues involving controversial and complex questions of fact arising out of moral and social dilemmas.

[43] Having regards to the above reasoning, it is my decision that the children in the present appeals were born outside the Federation, hence, art 14(1)(b) applies to them. The children are not entitled to citizenship by operation of law pursuant to s 1(b) of the Second Schedule of Federal Constitution by reason of the citizenship status of the children whose *father and not the mother* is at the time of birth a citizen. I am bound by the interpretation followed by majority decision in *CTEB*'s case. This is the precedent from higher court which ought not to be rejected. The decided issue is the same. The children are born outside the Federation and the fathers are not Malaysian citizen but the mothers are. Article 14(1)(b), s 1(b) of Part II of the Second Schedule clearly does not apply to Mothers' case.

[44] Based on the above reasons, I am of the considered view that the High Court in Appeal 531 has erred in that it failed to appreciate that the choice and use of the word 'father' by the framers of the Constitution was deliberate and context-sensitive. It was not meant to connote 'mother'. Whereas the High Court is Appeal 273 is correct in her interpretation following *CTEB*'s case. Therefore, at the moment, the underlying concepts and principles in *CTEB* held by the majority is the law to be followed and still binding on the doctrine of *stare decisis*. It is of supreme importance that people may know with certainty what the law is, and this can be attained by a loyal adherence to the doctrine of *stare decisis.* Little respect will be paid to our judgments if overthrow that one day which we have resolved the day before (see *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 ILJ 135; [2012] 3 CLJ 577).

CONCLUSION

[45] With the reasons given in the analysis, my decision is as follows:

(a) Mahisha's appeal in Appeal 273, is dismissed. The High Court decision is affirmed;

(b) the Government's appeal in Appeal 531 is allowed. The High Court decision is set aside; and

(c) both appeals are public interest cases, there shall be no order as to costs.

Azizah Nawawi JCA:

INTRODUCTION

[46] There are two related appeals before this court:

(a) W-01(A)-273–06 of 2020; and

(b) W-01(NCvC)(A)-531–09 of 2021.

[47] In W-01(A)-273–06 of 2020 ('Appeal 273'), the learned High Court judge had dismissed the appellant's application for several declaratory orders on citizenship under the Federal Constitution ('the FC'). This appeal is the appellant's appeal against the said decision.

[48] In W-01(NCvC)(A)-531–09 of 2021 ('Appeal 531'), the learned High Court judge had allowed the respondents' application for several declaratory orders on citizenship under the FC. This is the Government of Malaysia's ('GOM') appeal against the decision of the learned judge.

W-01(A)-273–06 of 2020 ('Appeal 273')

Salient facts

[49] The appellant ('Mahisha') was born in Chennai, India on 1 October 1997. Her biological father, Abdul Majeed Gani is an Indian citizen, whilst her biological mother, Masnah Banu bt Kamal was confirmed as a Malaysian citizen on 11 July 1998.

[50] Mahisha's parents were married under the laws of India on 10 June 1996. Subsequently they registered their marriage in Malaysia on 27 December 2005 at the Kulim Religious Department, District of Kulim, Kedah.

[51] Mahisha is married to Mohamed Naveen Sheik Mohideen (Republic of India Passport No H5607785) on 12 August 2016 at Jabatan Agama Islam Wilayah Persekutuan under the Malaysian Islamic Family Law (Federal Territories) Act 1984.

[52] Mahisha had submitted applications for citizenship by registration under art 15(2) of the FC, but were rejected by the GOM.

Originating Summons WA-24–73–12 of 2019

[53] Mahisha then filed an originating summons seeking the following relief:

A (a) a declaration that Mahisha is a citizen of Malaysia by operation of law by virtue of the citizenship of her mother, Masnah Banu bt Kamal (NRIC No 720329–02–6253) pursuant to art 14(1)(b), Part II, s 1(b) of the Second Schedule of the FC;

B (b) a declaration that the word 'father' in art 14(1)(b), Part II, s 1(b) of the Second Schedule of the FC shall be interpreted to mean either parent, that is, father or mother;

(c) a declaration that the GOM failure, refusal or omission to recognise Mahisha as a citizen of Malaysia contravenes art 8 of the FC; and

C (d) an order that the GOM issue Mahisha with a NRIC/MyKad or a Certificate of Confirmation of Status of citizenship which confirms Mahisha as a citizen of Malaysia within 14 days from the date of service of this order on the GOM.

D Decision of the High Court

[54] On 21 May 2020, the learned High Court judge had dismissed Mahisha's application with no order as to cost.

E *W-01(NCvC)(A)-531–09 of 2021 ('Appeal 531')*

Salient facts

F **[55]** The first respondent, Suriani Kempe, is the president and office bearer of a non-profit society, (Association of Family Support & Welfare Selangor & Kuala Lumpur ('Family Frontiers'), registered under the Societies Act 1966 and brings this action for and on behalf of the society and its members.

G **[56]** The second to seventh respondents are Malaysian mothers who are married to foreign spouses who had given birth to their children outside the Federation. It is also not in dispute that the children had acquired the citizenship of their non-citizen father's nationality. In any event, none of the children are without a citizenship or stateless.

H **[57]** The second to the seventh respondents have applied for their children's citizenship by registration pursuant to art 15(2) of the FC. However, their applications have since been rejected by the GOM.

I Originating Summons WA-24NCvC-2356–12 of 2020

[58] The respondents have filed the amended originating summons ('OS') seeking declaratory orders that their children are entitled to a Malaysian citizenship by operation of law under art 14(1)(b) read with the Second

Schedule, Part II, s 1(b) and/or 1(c) of the FC. The prayers sought in OS are as follows:

(a) a declaration that art 8 and art 14(1)(b) of the FC read with the Second Schedule, Part II, s 1(b) ought to be interpreted organically and harmoniously so as to not result in an interpretation that art 14(1)(b) of the FC (read with the Second Schedule, Part II, s 1(b)) is discriminatory and in violation of art 8 of the FC by conferring citizenship by operation of law on a child born outside the Federation whose father, but not the mother, is at the time of the birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State;

(b) a declaration that art 8 and art 14(1)(b) of the FC read with the Second Schedule, Part II, s 1(b) ought to be interpreted organically and harmoniously so as to not result in an interpretation that art 14(1)(b) (read with the Second Schedule, Part II, s 1(b) of the FC) is discriminatory and in violation of art 8 of the FC by conferring citizenship by operation of law on a child born outside the Federation whose father, but not the mother, is at the time of the birth a citizen and whose birth is, within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow, registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di-Pertuan Agong, registered with the Federal Government;

(c) a declaration that the Second Schedule, Part II, s 1(b) and s 1(c) of the FC should be read harmoniously with art 8 of the FC so as to include the mother of a child born outside the Federation in the circumstances stated in Second Schedule, Part II, s 1(b) and s 1(c) of the FC;

(d) a declaration that the mother of a child born outside the Federation in the circumstances stated in Second Schedule, Part II, s 1(b) and s 1(c) of the FC has a legitimate expectation that the defendant and all relevant agencies and departments under its purview would abide by its international obligations under, inter alia, the Convention on the Elimination of All Forms of Discrimination against Women ('the CEDAW') and the Convention on the Rights of the Child ('the CRC') and interpret the Second Schedule, Part II, s 1(b) and s 1(c) of the FC to be in accordance with the international obligations of the defendant under, inter alia, the CEDAW and CRC;

(e) a declaration that the proviso in art 8(2) of the FC which reads 'Except as expressly authorised by this Constitution' only applies to Part II of the FC and does not apply to arts 14 and 15 of the FC; and

(f) an order that all relevant agencies and departments under the purview of the defendant, including but not limited to the National Registration

Department, Immigration Department, Ministry of Foreign Affairs, Malaysian Consulates and Malaysian Embassies issue all documents relating to citizenship (including but not limited to the National Registration Card (MyKad, MyKid, etc) and passports) and all other documents that denotes the citizenship status of a child or children born outside the Federation whose mother is in the circumstances stated in Second Schedule, Part II, s 1(b) and 1(c) of the FC on the basis that such persons are citizens by operation of law if registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di-Pertuan Agong, registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di-Pertuan Agong, registered with the Federal Government.

Decision of the High Court

[59] On 9 September 2021, the learned High Court judge granted the following orders:

(a) a declaration that on the proper reading of the impugned provision the word father includes the mother and therefore the children of the second to seventh plaintiffs and all other women who faced with similar situation are entitled to citizenship by operation of law if all the procedures similar to those followed by the father are adhered to;

(b) time to comply with the necessary procedures are to be extended accordingly; and

(c) all the authorities are directed to issue the relevant documentations to effectuate the declaration of the court.

ISSUE

[60] The issue in both appeals is on the interpretation of art 14(1)(b) read together with s 1(b), Part II, Second Schedule of the FC.

[61] Mahisha (Appeal 273) and the second to seventh respondents in Appeal 531 (collectively the 'applicants') took the common position that the word 'father' in s 1(b), Part II, Second Schedule of the FC must be read to include 'mother', and therefore Mahisha and the children of the second to seventh respondents are entitled to citizenship by operation of law pursuant to of art 14(1)(b) of the FC read together with s 1(b), Part II, Second Schedule of the FC.

[62] The GOM took the position that the word 'father' in s 1(b), Part II, Second Schedule of the FC is clear and unambiguous and must be given a plain

and ordinary meaning. It simply means the 'biological father'. The word 'father' can only refer to 'mother' in the specific context as provided for in Part III on citizenship in the FC.

DECISION

[63] It is a common ground that the law on citizenship is exclusively provided for in the FC. The interpretation of the provisions on citizenship in the FC is also provided in the Constitution itself. This has been alluded to by this court in the case of *Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor (applying on their behalf and as litigation representatives for Pang Cheng Chuen, a child)* [2017] 3 MLJ 308, where Abang Iskandar (now CJ (Sabah and Sarawak)) said this in para 21:

> *We must state here that the law on citizenship is contained, both procedurally and substantively, in the Federal Constitution itself. There is no statute that was specially legislated to house the specific provision pertaining to citizenship. Rather, these provisions reside in the Federal Constitution.* We noted too that these provisions make no reference to other specific statutes, especially in aid of its interpretation. *In fact, the Federal Constitution itself provides for the interpretation required in order to make clear what the words in the citizenship provisions are supposed to mean. In other words, the citizenship provisions in the Federal Constitution are exclusively housed in the Federal Constitution itself.* The Federal Constitution, like most other written Constitutions, is interpreted not in the like manner in which other statutes are normally interpreted. In relation to the Federal Constitution, all other statutes are subsidiary legislations. Thus the constitutionality of the Federal Constitution is considered from the perspective of the Constitution itself. It is not to be interpreted by reference to other statutes, albeit they were passed by Parliament. (Emphasis added.)

[64] The FC has specified four ways of acquiring Malaysian citizenship and they are by:

(a) operation of law under art 14;

(b) registration pursuant to arts 15, 15A, 16, 16A and 18;

(c) naturalisation under art 19; or

(d) incorporation of territory pursuant to art 22.

[65] In the present appeals, we are only dealing with the issue of citizenship by operation of law under art 14. Article 14(1)(b) of the FC provides for the acquisition of Malaysian citizenship by operation of law, in relation to persons born on or after Malaysia day. Article 14 provides as follows:

> *14 Citizenship by operation of law*
>
> (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:

A (a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part I of the Second Schedule; and

(b) every person born on or after Malaysia Day and having any of the qualifications specified in Part II of the Second Schedule.

B **[66]** The application of art 14(1)(b) must be read with s 1, Part II, Second Schedule of the FC, which reads:

PART II

[Article 14(1)(b)]

C CITIZENSHIP BY OPERATION OF LAW OF PERSONS BORN ON OR AFTER MALAYSIA DAY

1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:

D (a) every person born within the Federation of whose parents one at least is at the time of the birth either a citizen or permanently resident in the Federation; and

(b) *every person born outside the Federation whose father is at the time of the birth a citizen and either was born in the Federation or is at the time of the birth in* E *the service of the Federation or of a State; and*

(c) every person born outside the Federation whose father is at the time of the birth a citizen and whose birth is, within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow, registered at a consulate of the Federation or, if it F occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di-Pertuan Agong, registered with the Federal Government; and

(d) every person born in Singapore of whose parents one at least is at the time of the birth a citizen and who is not born a citizen otherwise than by virtue of this para; and G

(e) every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this para. (Emphasis added.)

[67] It must be noted that art 14 read together with s 1, Part II of the Second H Schedule of the FC lays down the requisites of a citizenship by operation of law in very clear term. A person who meets all the criteria therein would qualify to become a citizen under that provision. Once the requisite conditions under these provisions are met, it is automatic that a person is a citizen by operation of law.

I **[68]** Therefore, for a person to be a Malaysian citizen by operation of law under art 14(1)(b) read with s 1, Part II, Second Schedule of the FC, he must fulfil the requisite qualifications stipulated by the said provisions and the requisite qualifications must be met at the time of his birth. This has been

decided by the majority decision of the Federal Court in *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 4 MLJ 236; [2021] 6 CLJ ('CTEB'), where Rohana Yusof PCA held as follows:

> [128] Of the four categories, *the operation of law citizenship is almost automatic. One either fits the given criteria under the FC or one does not. The criteria are clearly stipulated in the FC and it does not require any exercise of discretion by the authority.*
>
> [129] By operation of law, therefore entails a situation where at birth the person's status of citizenship will be so determined. It is a matter of birth right. This legal position is also as stated by Emeritus Professor Datuk Dr Shad Saleem Faruqi, in his book *Our Constitution* (Sweet & Maxwell, Thomson Reuters 2019) at pp 178–179. In practical terms, a birth certificate will be issued right away upon registration of such birth. While the other three categories of citizenship by registration and naturalisation require an application to the authorities upon meeting the necessary conditions imposed under the FC (see Suffian *An Introduction to the Constitution of Malaysia* (3rd Ed, Pacifica Publications 2007) at pp 330–337).
>
> ...
>
> [132] Citizenship by operation of law is not peculiar only to Malaysia. Many countries in the world recognise this principle of citizenship, based on its own set of criteria as well as the jus soli and jus sanguinis rule. *Hence, it is safe to conclude that whether one is qualified as a citizen by operation of law naturally must be discerned from the criteria as embedded in the FC itself, upon the true construction of the relevant provisions.*
>
> ...
>
> [194] Concluding my view and discussions, I am clear in my mind and reinforced in my view, *that the qualification of acquiring citizenship by operation of law must be met at birth. And if the qualifications are not met, this court is not at liberty to add and subtract any other or qualifications which the FC states otherwise*.

[69] It is also well established that the requisite qualifications for citizenship by operation of law under art 14(1)(b) of the FC read with s 1, Part II, Second Schedule of the FC are based on the concept of *jus soli* and *jus sanguinis*. These concepts have been explained by this court in *Pang Wee See*:

> [29] In determining citizenship of a person, two concepts are commonly applied, namely the concept of jus soli and the concept of jus sanguinis. *Jus soli which means 'right of the soil' and commonly birth right citizenship, is the right of anyone born in the territory of a state to nationality or citizenship*. The determining factor being the place or territory where a person was born. In the case *of jus sanguinis, which in Latin means 'right of blood', is a principle of nationality law by which citizenship is not determined by place of birth but by having one or both parents who are citizens of the state* ... (Emphasis added.)

[70] In the context of the present appeals, where the applications for citizenship by operation of the law are made pursuant to art 14(1)(b) read with s 1(b), Part II, Second Schedule of the FC, the key requirements for the

A acquisition of citizenship by operation of law encompasses the principle of *jus sanguinis.* This provision allows for the transmission of citizenship to the children because their father is a Malaysian citizen. Thus the citizenship by operation of law under this provision requires a blood relationship between the father and the child under the doctrine of *jus sanguinis*.

B

[71] Therefore, under art 14(1)(b) read with s 1(b), Part II, Second Schedule of the FC, the applicants would have to comply with the following requirements:

C (i) they were born on or after Malaysia Day;

(ii) they were born outside the Federation;

(iii) at the time of their birth, their fathers are citizens; and

D (iv) their fathers were born in the Federation or at the time of their birth, their fathers were in the service of the Federation or of a State.

[72] It is not in dispute that the applicants have satisfied requirements (i) and (ii) that they were born after Malaysia Day outside the Federation. However, E the applicants have failed to satisfy requirements (iii) and (iv), as the applicants' fathers are not Malaysian citizens within the ambit of s 1(b), Part II, Second Schedule of the FC.

[73] The applicants took a common stand, that they are citizens of Malaysia F by virtue of the applicants' mothers' Malaysian citizenship, pursuant to art 14(1)(b) read with s 1(b), Part II, Second Schedule of the FC. It is the submission of the applicants that the word 'father' in s 1(b), Part II, Second Scheduleof the FC should be interpreted to mean either parent, that is, father or mother. On this basis, the applicants submit that they are entitled to G Malaysian citizenship pursuant to their mothers' Malaysian citizenship status.

[74] The applicants' contention was accepted by the learned judge in Appeal 531, but was rejected by the learned judge in Appeal 273.

H

[75] I am of the considered opinion that the learned judge in Appeal 531 has committed a fundamental error when he allowed the applicants' application for declaratory orders on citizenship under art 14(1)(b) read with s 1(b), Part II, Second Schedule of the FC. When the learned judge delivered his decision on I 9 September 2021, he has failed to apply the majority decision of the Federal Court in *CTEB*, which was delivered on 28 May 2021. In fact, *CTEB*'s case was referred to the learned judge by the learned senior federal counsel, but the learned judge kept an ominous silence on the application of the decision of the Federal Court in *CTEB*.

[76] In *CTEB*, the issue before the Federal Court was whether an illegitimate child born outside Malaysia, to a Malaysian biological father and a Filipino mother, was entitled to become a citizen by operation of the law pursuant to art 14(1)(b) read together with s 1(b), Part II and s 17 of Part III, Second Schedule of the FC.

[77] In the High Court, as reported in *CTEB & Anor v Ketua Pengarah Pendaftaran Negara & Ors* [2018] 1 CLJ 671, the learned High Court judge gave a literal interpretation to art 14(1)(b) of the FC read with s 1(b), Part II of the Second Schedule and held that the child, being an illegitimate child, was not allowed to take after his biological Malaysian father citizenship. This is because, s 17, Part III of the Second Schedule, has specifically and unambiguously construed that the word 'father' for the purpose of Part III of the FC which governs the acquisition of citizenship, in relation to a person who is illegitimate, refers to his mother.

[78] The decision of the learned High Court judge was affirmed by the Court of Appeal in *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2020] 4 CLJ 597, where the court said as follows in paras 4, 10 and 19:

> [4] Reading the above-cited provisions, we find *there will not be any problem if a child is born legitimate to a father who is a Malaysian citizen even if he is born outside the Federation.* But in the instant appeal, the child was born out of wedlock. He was illegitimate at the time of his birth. So there comes the problems. Section 17 of Part III of the Second Schedule specifically stipulates that 'father' in relation to a person who is illegitimate refers to his mother.
>
> ...
>
> [10] Having perused the grounds of judgment of the learned High Court judge and considered the submission of the party before us, we found no reason to depart from the decision of the learned High Court judge. With due respect to learned counsel for the appellants, *we found the wording of s 1(b) of Part II of the Second Schedule is very clear.* It talks about every person born outside the Federation *'whose father as at the time of the birth a citizen'* ...
>
> ...
>
> [19] *It cannot be argued, our FC provides that children born overseas to a Malaysian father obtain citizenship through operation of law. If a child is born out of wedlock or prior to the marriage registration of his parents, the citizenship status of the child is determined by his mother's citizenship status. His mother's citizenship applies.* It does not matter that the parents got married later. That is in our view irrelevant, as the cut-off date for determination is the date of his birth. That is the letter of the FC and being the supreme law of the Federation, no written law such as the LA 1961 can be used to interpret it otherwise. (Emphasis added.)

[79] Both decisions of the learned High Court judge and the Court of

Appeal were affirmed by the apex court in *CTEB*. The Federal Court, in interpreting art 14(1)(b) of the FC read with s 1(b) of Part II and s 17 of Part III of the Second Schedule, held that the word 'father' in s 1(b) of Part II refers to the child's biological father. However, with regard to illegitimate children, s 17 of Part III has construed the word 'father' in s 1(b) to mean 'mother'. In para 68, the Federal Court held as follows:

> 68 ... The word 'parents' in s 1(a) is not defined in the FC. As such we have to rely on the plain and ordinary meaning of the word. *Black's Law Dictionary Abridged* (6th Ed) (Centennial Edition 1891–1991) defines the word 'parent' to mean 'the lawful father or mother of a person'. Therefore, in defining the word 'parents' in s 1(a) giving a plain and ordinary meaning must refer to lawful parents. *In the same light, the word 'father' in s 1(b) must also refer to a father in a valid marriage*. (Emphasis added.)

[80] In simple terms, the word 'father' in s 1(b), Part II of the Second Schedule means the biological father. The word 'father' must mean 'mother' in the specific circumstance prescribed by s 17, Part III of the Second Schedule, in the specific situation where the child was born out of wedlock, that is in the case of an illegitimate child. Other than this specific situation in respect of an illegitimate child, the word 'father' in s 1(b) of Part II must refer to the biological father.

[81] Where the Federal Court in *CTEB* had interpreted the word 'father' in s 1(b), Part II of the Second Schedule to mean the father, it is not open for the learned High Court judge in Appeal 531 to interpret the word 'father' in s 1(b), Part II of the Second Schedule, and subsequently declared that the word 'father' is to include 'mother'.

[82] Premised on the reasons enumerated above, I am of the considered opinion that based on the case of *CTEB*, the word 'father' in art 14(1)(b) read with s 1(b), Part II, Second Schedule of the FC must be given a plain and ordinary meaning and it simply means father, not parents or mother.

[83] Next, I will also deal with the issues raised by the applicants. Essentially, learned counsels for the applicants have submitted on the following issues:

(a) a prismatic approach encompassing the harmonious construction of all provisions of the FC and the organic theory must be preferred over the literal approach;

(b) art 8 of the FC;

(c) International Conventions (CEDAW); and

(d) the application of the Federal Court decision of *CTEB* against the more recent Federal Court decision in *CCH & Anor (on behalf of themselves*

and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia [2022] 1 MLJ 71; [2022] 2 AMR 1; [2022] 1 CLJ 1 ('CCH').

Issue (i) — Construction of the FC

[84] It is the submission of the applicants that in construing art 14(1)(b) of the FC read with s 1(b), Part II, Second Schedule, the preferred cannons of construction, the harmonious and organic theory must prevail over the literal interpretation. A prismatic approach must be taken when interpreting the fundamental liberties, and that the provisions dealing with fundamental liberties ought to be interpreted generously.

[85] In the majority judgment of *CTEB*'s case, Rohana Yusuf (PCA) has held that the fundamental rule in interpreting the Federal Constitution is to give effect to the intention of the framers. Her Ladyship said this in para 48:

> *The fundamental rule in interpreting the FC or any written law is to give effect to the intention of the framers. The court cannot insert or interpret new words into the FC. The court may only call in aid other canons of construction where the provisions are imprecise, protean, evocative or can reasonably bear more than one meaning.* I find s 17 is plain and clear in its meaning. The court should not endeavour to achieve any fanciful meaning against the clear letter of the law. (Emphasis added.)

[86] In order to give effect to the intention of the framers of the FC, Justice Rohana Yusuf looked at the relevant historical documents which shows the process of how the current art 14(1)(b), s 1(b) of Part II, and s 17 of Part III of the Second Schedule of the FC come into existence. From the historical documents, the Federal Court came to the finding that it has always been the position taken by the framers of the FC that an illegitimate child's citizenship is to follow that of the mother, not the father. This position has remained as the law to date (see paras 77–82).

[87] For the purpose of these appeals, the relevant historical documents can be traced to the Alliance Party Memorandum to the Reid constitutional Commission. In their proposal for Common Nationality, para (c) at p 13 under the heading 'Those born outside Malaysia' suggests that:

> *Any person born anywhere outside Malaysia after the declaration of independence and whose father at the time of the child's birth is a national should be eligible to become a national.* There should be a system of registration after independence at consulates, legations and embassies of Malaysia abroad. (Emphasis added.)

[88] The Rulers also made the same proposal, and this was emphasised by Neil Lawson QC, as counsel on behalf of the Rulers, at the hearing before the

Reid Commissioners held on 14 September 1956:

> Mr. Lawson: ... Their Highnesses propose that on and after the date of independence anybody who is born in any part of the Federation or *anybody who is born outside the Federation whose father is at that date a Federal Citizen, except by descent only, should automatically acquire the citizenship of the Federation.* That is the first main proposition ...(Emphasis added.)

[89] In the draft provisions on citizenship dated 4 October 1956 prepared by Sir Ivor Jennings, where relevant, much emphasis was placed on the status and description of 'father':

> Citizenship by Operation of Law
>
> (1) Subject to the provisions of this Article, a person shall be a citizen of Malaya by operation if law if he —
>
> (a) was a citizen of the Federation immediately before Merdeka Day; or
>
> (b) is born in the Federation on or after Merdeka Day; or
>
> (c) is born outside the Federation on or after Merdeka Day of a father who was on the date of the birth a citizen of Malaya.
>
> (2) A person shall not be a citizen of Malaya by virtue of para (b) of Clause (1) if at the time of his birth —
>
> (a) *his father* possesses such immunity from suit and legal process as is accorded to an envoy of a foreign sovereign power accredited to the Yang di-Pertuan Besar and is not a citizen of Malaya; or
>
> (b) *his father* is an enemy alien and the birth occurs in a place then under occupation by the enemy.
>
> (3) A person shall not be a citizen of Malaya by virtue of para (c) of Clause (1) unless —
>
> (a) *his father* was born in the Federation; or
>
> (b) his birth is registered at a Malayan consulate within one year of its occurrence or, with the concurrence of the Government of the Federation, later; or
>
> (c) *his father* is, at the time of his birth, in service under the Government of the Federation or of a State. (Emphasis added.)

[90] The proposed draft was approved by the Reid Commission in its 47th Meeting held on 10 October 1956. Pertinently, on cl 1(c), which is the precursor of s 1(b) and 1(c) of Part II of the Second Schedule, the Commissioners remarked as follows:

> This clause would include *those born outside the Federation on or after Merdeka Day of a father who was entitled on Merdeka Day to become a citizen of the Federation* but

who had not at that time taken up his right. (Emphasis added.) A

[91] The same proposed draft as agreed upon by the Reid Commissioners was substantially adopted in the Draft Constitution of the Federation of Malaya, appended in the Reid Commission Report. The Draft Constitution of the Federation of Malaya appended in the Reid Commission Report was examined and commented upon by the constitutional Commission Working Party chaired by the British High Commissioner in Malaya and comprised of the Alliance government representative and the Rulers' representatives. B

C

[92] From the said historical documents, I am of the considered opinion that the framers of the Constitution has ascribed a distinct meaning to the word 'father' in s 1(b) of Part II, Second Schedule. The word 'father' simply means the biological father who is a Malaysian citizen. It cannot mean the biological Malaysian mother as in the present appeals. This interpretation is consonant with the majority decision in *CTEB*, where the majority has held that the word 'father' in s 1(b) means the father, but if the child is illegitimate, s 17 of Part III provides that the reference to the father in s 1(b) of Part II, must necessarily refer to his mother. D

E

[93] Based on the aforesaid reasons, I am of the considered opinion that the learned judge in Appeal 531 was plainly wrong when he concluded that by applying the 'original intent' theory of interpretation, there was no conscious effort to discriminate between the mother and the father in granting citizenship. F

[94] In fact, the framers of the Constitution have used different words in Part III of the FC, on citizenship. On this issue, I agree with the submissions of the learned senior federal counsels ('SFC') for the GOM, that the choice and use of the different words was deliberate and context sensitive. Section 1(a), 1(d) and 1(e) of Part II of the Second Schedule refer to 'whose parents one at least'. These provisions refer to either the father or the mother. But s 1(b) and 1(c) of Part II are only confine to 'whose father'. Then we have s 17 of Part III, Second Schedule which provides that in respect of illegitimate children, a reference to a person's 'father or his parent' must be construed as reference to his 'mother'. G H

[95] I am of the considered opinion and I agree with the learned SFCs that the clearest proof that the word 'father' in s 1(b) and 1(c) of Part II of the Second Schedule is context-sensitive and does not include 'mother' can be seen in the interpretative clause found in s 17 of Part III Second Schedule. Section 17 puts it beyond peradventure that the status of the 'mother' only comes into play in the case of an illegitimate child. Therefore, as held by *CTEB*'s case, even though the biological father is a Malaysian citizen, the child's citizenship I

follows that of his mother due to the illegitimacy status.

[96] Likewise, s 19 of Part III Second Schedule which provides for the status of a posthumous child only concerns itself with the 'status or description of the father at the time of the father's death', and not of the 'mother'. Section 19 is directly applicable in the case of a child born outside Federation as stipulated in s 1(b) and 1(c) of Part II of the Second Schedule.

[97] Therefore the use of the different word, 'father' in s 1(b) and 1(c) of Part II, the words 'whose parents one at least' in s 1(a), 1(d) and 1(e) of Part II and the word 'mother' in s 17 Part III of the Second Schedule must necessarily mean different things.

[98] In *Lee Lee Cheng (F) v Seow Peng Kwang* [1960] 1 MLJ 1; [1958] 1 LNS 32, Thomson CJ (as he then was) in the Federation of Malaya's Court of Appeal, drew a distinction between the word jurisdiction and power and held as follows:

> *It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here, used repeatedly*. This leads to the view that in the (Courts Ordinance 1948) there is a distinction between the jurisdiction of a court and its powers, and this suggests that the word 'jurisdiction' is used to denote the types of subject matter which the court may deal with and in relation to which it may exercise its powers. It cannot exercise its powers in matters over which, by reason of their nature or by reason of extra-territoriality, it has no jurisdiction. On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its powers. (Emphasis added.)

[99] Therefore, where the framers have used different words deliberately in Part III on citizenship in the FC, they must refer to different things. Thus, the word 'father' is distinct from the word 'mother' or 'parents'. As such, the word 'father' in s 1(b) of Part II must necessarily mean the biological father, not the biological mother.

[100] The applicants have relied on the doctrine of harmonious construction that was explained in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257; [2004] 1 CLJ 701:

> If art 160(2) is not interpreted together with s 3(1) it would render the section otiose in so far as its power to modify the common law in the future is concerned. This will militate against one of the recognised canons of construction of a Constitution *which is that if two constructions are possible the court must adopt the one which will ensure the smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory* (see *State of Punjab v Ajaib Singh* AIR [1953] SC 10). (Emphasis added.)

[101] The applicants have also relied on the case *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 141, where the Federal Court held as follows:

> [78] In this regard, it would be convenient for us to discuss the doctrine of harmonious constructions. *To put it simply, the doctrine of harmonious construction means a statute should be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute. Such an interpretation is beneficial in avoiding any inconsistency or repugnancy either within a section or between a section and other parts of the statute*. The five main principles of this doctrine/rule are as follows:
>
> (a) the court must avoid a head on clash of seemingly contradictory provisions and they must construe the contradictory provisions so to harmonise them (see Commissioner of *Income Tax v Hindustan Bulk Carriers* [2002] 3 SCC 57 at p 74);
>
> (b) the provision of one section cannot be used to defeat the provision contained in another unless the court, despite all its efforts, is unable to find a way to reconcile their differences;
>
> (c) when it is impossible to completely reconcile the differences in contradictory provisions, the courts must interpret them in such a way that effect is given to both provisions as much as possible (see *Sultana Begum v Prem Chand Jain* AIR [1997] SC 1006 at pp 1009–1010);
>
> (d) courts must also keep in mind that interpretation that reduces one provision to useless or dead lumber is not harmonious construction (see *Commissioner of Income Tax v Hindustan Bulk Carriers* [2002] 3 SCC 57 at p 74); and
>
> (e) to harmonise is not to destroy any statutory provision or to render it fruitless. (Emphasis added.)

[102] In respect of *Danaharta* case, the court held that if two constructions are possible, the court must adopt the one which will ensure the smooth and harmonious working of the Constitution. But in present case, as decided by the Federal Court in *CTEB*'s case, there is only one construction of art 14(1)(b) read with s 1(b) of Part II and s 17 of Part III, Second Schedule, that is, the word 'father' in s 1(b) of Part II refers to the father in any given circumstances. However, the word 'father' in s 1(b) of Part II, Second Schedule must be interpreted to mean the biological mother where the child is illegitimate.

[103] With regard to the case of *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar*, on the factual matrix of the case, the Federal Court made a finding that there is undoubtedly a conflict or inconsistency between s 16(4) of the Local Government Act 1976 and reg 25(2) of the Public Officers (Conduct and Discipline) Municipal Council of the Province Wellesley Regulations 1995. The apparent conflict is quite

A obvious. Whilst s 16(4) provides that no officer or employee shall be reduced in rank or dismissed without being given a reasonable opportunity of being heard, reg 25(2) provides the complete opposite if a criminal charge has been proved against the employee. In view of the apparent conflict, the court resorted to harmonious interpretation and struck down reg 25(2) as being ultra vires the B parent act, s 16(4) of the Local Government Act 1976.

[104] However, in the present appeals, I am of the considered opinion that there is no apparent or seeming conflict between Part III on citizenship and C Part II on Fundamental Liberties. They are fundamental provisions of equal standing housed under different parts of the Federal Constitution and there is nothing in the Constitution itself to specify that Part III of the FC on citizenship is subject to Part II, on Fundamental Liberties.

D **[105]** In any event, the Federal Court in *CTEB* has held that the fundamental rule in interpreting the FC is to give effect to the intention of the framers. The court may only call in aid from other cannons of construction where the provisions are imprecise, protean, evocative or can reasonably bear more than one meaning. In *CTEB*'s case itself, the court held that the provisions E concerned, that is art 14(1)(b) read with s 1(b) of Part II and s 17 of Part III, Second Schedule are plain and unambiguous. As such, there is absolutely no necessity to call in the other cannons of construction, such as the harmonious construction or the organic theory.

F **[106]** This is supported by the decision of the Federal Court in *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273; [1981] CLJ Rep 82, where Suffian LP held as follows:

> Thirdly, if the law-maker so amends the law, to paraphrase the words of Lord G Diplock at p 541 in *Duport Steels Ltd v Sirs* [1980] 1 All ER 529, *the role of the Judiciary is confined to ascertaining from the words that the law-maker has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the words is plain and unambiguous it is not for judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning* because they H themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral or to paraphrase the words of Lord Scarman at p 551 in the same case, in the field of statute law the judge must be obedient to the will of the law-maker as expressed in its enactments, the judge has power of choice where differing constructions are possible, but he must choose the construction which in I his judgment best meets the legislative purpose of the enactment. Even if the result be unjust but inevitable, he must not deny the statute; unpalatable statute law may not be disregarded or rejected, simply because it is unpalatable; the judge's duty is to interpret and apply it. (Emphasis added.)

Issue (ii) — Article 8 to be given primacy

[107] It is also the pleaded case of the applicants that art 8(2) of the FC was amended (vide Federal Constitution (Amendment) (No 2) Act 2001 (Act A1130) to prohibit discrimination on the ground of gender. The amended art 8(2) of the FC provides that there shall be no discrimination against citizens on ground of, inter alia, 'descent, place of birth or gender'. This amendment came into force on 28 September 2001. However, the Second Schedule, Part II of the Federal Constitution was not amended to reflect the amendment to art 8(2) of the FC.

[108] It is therefore the submission of the applicants that the FC must be construed as a whole to give effect to the amendment via Act 1130, which prohibits discrimination based on gender. As such, in order to avoid art 14(1)(b) read with s 1(b), Part II being repugnant to art 8(2) of the FC, a harmonious construction must be adopted so that the word 'father' in s 1(b) of Part II must be read to include 'mother'. At the same time, the applicants have also moved this court to apply the organic theory and to interpret s 1(b) of Part II, Second Schedule in light of the amended art 8(2) so that s 1(b) fits into the society as it stand today. This calls for this court to give primacy or priority to the provisions on fundamental liberties. In the context of these appeals, art 8(2) is to be given primacy or priority over other provisions in the Federal Constitution, including art 14(1)(b) read with s 1(b), Part II of Second Schedule of the FC.

[109] Article 8 is under Part II Fundamental Liberties, of the FC. Articles 5 to 13 in Part II of the FC encompasses the fundamental liberties guaranteed by the FC. Many cases have been articulated by the applicants to establish the principle that the fundamental liberties under Part II of the FC must be read generously and not pedantically, nor in a restrictive manner. I accept this proposition that has been well established by the apex court in this country.

[110] However, the issue that the applicants have raised here is that the fundamental liberty clause, art 8(2) must be given primacy or priority over all the other provisions in the FC, and in the context of these appeals, over art 14(1)(b) read with s 1(b) of Part II, Second Schedule of the FC.

[111] In para 74 of the applicants' written submission in Appeal 531, it is the submission of the applicants that:

> *Principle D: Fundamental Liberties to be given primacy*
>
> 74. Further, we humbly submit that it is equally well entrenched that provisions dealing with *fundamental liberties ought to be interpreted generously and given primacy when the process of interpretation of the FC is taken as a whole*. Instead, any

A interpretation or provisos which seek to derogate from these fundamental liberties must be read restrictively. (Emphasis added.)

[112] It is my considered opinion that art 8(2) must not be read to be given primacy or priority over art 14(1)(b) read with s 1(b) of Part II, Second Schedule of the FC because all provisions in the FC are of equal standing as between themselves and are not subordinate to any other. To accede to such a proposition would mean that other articles of the FC must be read subject to art 8 or that art 8 must prevail over the other articles in the FC on an alleged repugnancy. In *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750; [2021] 2 CLJ 579, Abdul Rahman Shebli FCJ in the majority judgment said this:

> *All articles of the Federal Constitution are of equal standing as between themselves and are not subordinate to any other.* As Raja Azlan Shah FJ explained in *Loh Kooi Choon v Government Of Malaysia* [1975] 1 LNS 90 when he spoke of the effect of amendment to the Federal Constitution:
>
> > When that is done it becomes an integral part of the Constitution, *it is the supreme law, and accordingly it cannot be said to be at variance with itself.* A passage from the Privy Council judgment in *Hinds v The Queen*, is of some assistance (p 392):
> >
> > > That the Parliament of Jamaica has power to create a court ... is not open to doubt, but if any of the provisions doing so conflict with the Constitution in its present form, then it could only do so effectively if the Constitution was first amended so as to secure that there ceased to be any inconsistency between the provisions and the Constitution. (Emphasis added.)

[113] Even though the case of *Maria Chin Abdullah* was overruled by a later Federal Court decision in *Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors* [2022] 3 MLJ 356; [2022] 5 CLJ 1 on the issue of ouster clause, Justice Nallini Pathmanathan FCJ had recognised that both the provisions on fundamental liberties and citizenship are the fundamental features of the FC, which are central and fundamental to the peace and stability of this nation. As such, art 8(2) cannot be said to prevail over art 14(1)(b) of Part II read with s 1(b) of Part II, Second Schedule of the FC. Paragraph 123 of *Dinesh Tanaphll* reads as follows:

> 123 The answer is that the supremacy and priority of the FC sets boundaries to constitutional amendment. *The FC contains the basic or fundamental features that are essential for forming the State and society. It is these fundamental features that should therefore give structure and direction to the enactment of laws and for the administration of those laws. The basic features of the FC, such as art 3 FC relating to religion, the fundamental liberties in Part II FC, citizenship of the State,* the role of the YDPA and the Malay rulers as the heads of religion, the division of power between the Executive, Legislature and the Judiciary with the YDPA at the head, all comprise the

basis on which the State and social order were prescribed, *which are central and fundamental to the peace and stability of the nation.* (Emphasis added.)

[114] Another reason why art 8 must not read to prevail over art 14(1)(b) read with s 1(b), Part II of Second Schedule is because the provisions on citizenship in Part III of the FC are entrenched and can only be amended by the following the process in art 159(5) of the FC, that is:

159 Amendment to the Constitution

(1) Subject to the following provisions of this Article and to Article 161E, the provisions of this Constitution may be amended by federal law.

...

(3) *A Bill for making any amendment to the Constitution (other than an amendment except from the provisions of this Clause) and a Bill for making any amendment to a law passed under Clause (4) of art 10 shall not be passed in either House of Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of members of that House.*

...

(5) *A law making an amendment to ... the provisions of Part III ... shall not be passed without the consent of the Conference of Rulers*... (Emphasis added.)

[115] Therefore, where art 8 may be amended with a two-third majority under art 159(3) of the FC, Part III on citizenship has the additional security whereby any amendment can only be passed with the consent of the Conference of Rulers.

[116] In fact, where the country is under a Proclamation of Emergency under art 150, art 150(6A) provides that neither the Legislature nor the Executive may enact any provision relating to religion, citizenship or language except as authorised by the Constitution. There is no such special treatment given to art 8, and any law which appears to Parliament to be required by reason of the emergency, even if it offends art 8, shall not be declared invalid on the ground of inconsistency with art 8 of the FC. This is clearly provided under art 150(6). These provisions read:

(6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution.

(6A) Clause (5) shall not extend the powers of Parliament with respect to any matter of Islamic law or the custom of the Malays, or with respect to any matter of native law or customs in the State of Sabah or Sarawak; nor shall Clause (6) validate any

provision inconsistent with the provisions of this Constitution relating to any such matter or relating to religion, citizenship, or language.

[117] These additional safeguards in arts 150(6A) and 159(5) of the FC to protect the provisions on citizenship in Part III of the FC can be correlated to the notion that the FC should be construed as an embodiment of the social contract entered at the time of independence. In an article *Evolving a Malaysian Nation* by HRH Sultan Azlan Shah published in constitutional Monarchy, Rule of Law and Good Governance [2004] at pp 330–331, HRH stated:

> We embarked on a journey as a constitutional democracy with the full realisation that we were a multi-racial people with different languages, cultures and religion. Our inherent differences had to be accommodated into a constitutional framework that recognised the traditional features of Malay society with the Sultanate system at the apex as a distinct feature of the Malaysian Constitution.
>
> Thus there was produced in August 1957 a unique document without any parallel anywhere. It adopted the essential features of the Westminister model and built into it the traditional features of Malay society.
>
> *This Constitution reflected a social contract between the multi-racial people of our country*.
>
> It is fundamental in this regard that the Federal Constitution is the supreme law of the land and constitutes the grundnorm to which all other laws are subject. *The essential feature of the Federal Constitution ensures that the social contract between the various races of our country embodied in the independence Constitution of 1957 is safeguarded and forever ensures to the Malaysian people as a whole for their benefits*. (Emphasis added.)

[118] Citizenship is certainly part of the social contract. In *An Introduction to the Constitution of Malaysia* (1972 Ed) (Chapter 16 — Citizenship) by Tan Sri Mohammad Suffian bin Hashim, the writer opined that:

> The idea of a common citizenship came from the British architects of the Malayan Union, and the Order in Council establishing that union contained provisions of the acquisition of federal citizenship, but they never came into effect. The Malays were opposed to the idea of granting citizenship except to persons whose loyalty was not in doubt. *The terms that were eventually agreed were the result of compromise, and these terms were written into the Federation of Malaya Agreement, 1948. They were repeated with modifications in the present Constitution promulgated in 1957. The bargain that was struck between the representatives of the major communities was that in return for the relaxation of the conditions for the granting to non-Malays of citizenship, the rights and privileges of Malays as the indigenous people of the country were to be written into the Constitution,* and there were other provisions also agreed to by the non-Malays leaders. (Emphasis added.)

[119] This is reiterated in the speech made by the Prime Minister when he introduced the bill to amend art 159, and art 159(5) was inserted by

amendment Act A30. As reported in the Hansards of 23 February 1971/p 57, the Prime Minister said this:

> Mr Speaker, Sir, it is hardly necessary for me in this House to expound upon the *careful and balanced character of the Constitution which was so painstakingly negotiated and agreed upon by the major races in Malaysia before we attained independence. Part III of the Constitution relates to the provisions regarding citizenship. Let those who are citizens of Malaysia under its provisions be ensured clearly that their rights shall not be challenged. This is surely important to them so that whatever fears may have been aroused will now be set at rest.*
>
> *Now, the basic provisions relating to the acquisition of citizenship represented a fair and balanced compromise.* The same careful and balanced approach runs through the other provisions of the Constitution protecting the legitimate rights of all races in Malaysia. Thus the provisions relating to the special position of the Malays are balanced by the guaranteed protection of the legitimate interests of the other communities and by the citizenship provisions to which I have referred. The provisions relating to the position of Bahasa Malaysia as the sole official and National Language is balanced by the guarantee for the use of the languages of other races other than for official purposes. As regards the provision relating to the sovereignty of the Rulers, surely no one will disagree that their position should never be open to attack or challenge. Any self-respecting people will surely want to ensure that the position of its Rulers should not be subject to debate in the political arena. (Emphasis added.)

[120] Hence, where the provisions on citizenship involved policy considerations by our forefathers, and formed part of the social contract, they may only be altered by the Malaysian citizens through their representatives in Parliament, subject to the approval from the Conference of Rulers. It must be noted that legislation promoted social policy and a tool to achieve a societal goal. So if the society want changes to the law on citizenship, then Parliament is the forum to bring such changes as legislation is the manifestation of the will of the people in a constitutional democracy. In *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277; [2020] 8 CLJ 147, Azahar Mohamed CJ (Malaya) held that the controversial matters of policy involving different views on the moral and social issues is inherently a matter for determination by the elected Legislature, rather than the court.

[121] As such, for those who are affected by the provisions in Part III of the FC on citizenship, they should address their grievances to their elected representatives. In *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, HRH Raja Azlan Shah said this:

> Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the Legislature and not the courts; they have their remedy at the ballot box.

[122] Indeed this was also the position taken by the Federal Court in *CTEB*, as can be seen from paras 87, 88 and 89 of the judgment:

> [87] I am in full agreement with the views expressed that the provisions on citizenship are gender bias in that it emphasises on the citizenship of the father and not the mother. I hasten to add, lest it be misunderstood that I am all for the abolition of gender discrimination. *There have been calls by various NGOs and Women groups to address these discriminatory issues to propose for the FC to be amended to eliminate gender bias.* Hannah Yeoh, the then Deputy Minister of Women, Family and Community Development, had issued many statements *calling for amendments to the laws to achieve gender equality in this area* (see Arfa Yunus, 'Yeoh: 'It's 2019, treat men, women equally. *New Straits Times Online*, 19 September 2019). *That was a rightful call because it is only by way of the amendment of the FC that this discrimination may be altered.*
>
> [88] This whole issue begs the question of whether the Judiciary in the exercise of its judicial duty is constitutionally empowered to ignore or neglect the clear dictates of the FC and overcome that authorised gender bias in the name of progressive construction of the FC. Since the FC discriminates between a legitimate and an illegitimate child, a father and a mother of an illegitimate child, can the court alter that discrimination so as to keep the FC dynamically alive in order to avoid it from being locked and fossilised in 1963?
>
> [89] What happens to the much-lauded doctrine of separation of powers and the judicial oath of upholding the Constitution? Is it not the doctrine of separation of powers which forms the basis of our democratic nation that deserves our attention and respect. We all know that there is no judicial supremacy articulated in our FC, and the power to amend the Constitution rests solely with Parliament by virtue of art 159. The court cannot at its own whims and fancies attempt to rewrite the clear written text of the FC because it would only lead to absurdity. (Emphasis added.)

[123] In fact, the Constitution of the Republic of Singapore was amended in 2004 to address this gender inequality. Just like our FC, art 122(1) provides that a person born outside Singapore after 16 September 1963 shall be a citizen of Singapore by descent if, at the time of his birth his father is a citizen of Singapore, by birth or registration. However, in 2004 art 122 was amended to include mothers as well.

[124] Therefore, under the amended art 122(1)(b), a person born outside Singapore after the date of commencement of s 7 of the Constitution of the Republic of Singapore (Amendment) Act 2004, shall be a citizen of Singapore by descent if, at the time of his birth, either his father or mother is a citizen of Singapore, by birth, registration or descent. As such, the rights of the mothers have now been recognised by the constitutional amendment. The said provision reads as follows:

> *Citizenship by descent*

122(1) Subject to clauses (2) and (3), a person born outside Singapore after 16 September 1963 shall be a citizen of Singapore by descent if, at the time of his birth —

(a) where the person is born before the date of commencement of section 7 of the Constitution of the Republic of Singapore (Amendment) Act 2004, his father is a citizen of Singapore, by birth or registration; and

(b) where the person is born on or after the date of commencement of section 7 of the Constitution of the Republic of Singapore (Amendment) Act 2004, *either his father or mother is a citizen of Singapore, by birth, registration or descent*. [12/2004]

[125] Based on the reasons enumerated above, I am of the considered opinion that art 8(2) must not be read to be given primacy or priority over art 14(1)(b) read with s 1(b) of Part II, Second Schedule of the FC. In order words, art 14(1)(b) read with s 1(b) of Part II, Second Schedule is not subject to art 8(2) of the FC.

[126] In the context of these appeals, I find that the learned judge in Appeal 531 has erred in his interpretation and declaration that the word 'father' in s 1(b), Part II of the Second Schedule include the 'mother', as the effect of his interpretation and declaration was to amend a fundamental provision of the FC without any due regard to the role of the Conference of Rulers prescribed under art 159(5) of the FC. Reference is also made to what the Federal Court said in *Dhinesh a/l Tanaphll*:

[125] This is not to say that constitutional amendment is forestalled. On the contrary, constitutional amendment may well be required for desirable development and for constitutional improvement. *However, this cannot be extended to fundamental provisions or the essential features of the Constitution, as there would then result a new Constitution rather than constitutional improvement. Hence the provisions of* art 4(1) *which preclude inconsistency with the FC in its entirety*. (Emphasis added.)

[127] Following *Dhinesh a/l Tanaphll*, even Parliament must take the necessary measure to ensure that any amendment to the FC must not result in a new Constitution, especially with regard to fundamental provisions, including Part III on citizenship. If Parliament is bound by the basic structure principle that it cannot amend the FC resulting in a new Constitution, how can the High Court rewrite the FC by declaring the word 'father' in s 1(b), Part II, Second Schedule to include 'mother'. Even though the learned judge is authorised to interpret the FC, he is not authorised to amend or rewrite the FC. As highlighted by Justice Rohana Yusuf, PCA in *CTEB*'s case, the court cannot at its own whims and fancies attempt to rewrite the clear written text of the FC.

Issue (iii) — Gender discrimination

[128] The word gender was only inserted into art 8(2) in the year 2001, vide constitutional amendment, Act A1130. It must be noted that the constitutional provisions in Part II of the Second Schedule predate the amendment in 2001.

[129] From the Hansard, it is clear that when Parliament sought to include the word 'gender' in art 8(2) vide Act A1130, there was an express caveat that the amended art 8(2) shall not apply to the provisions on citizenship in Part III of the Constitution. The intention was made clear by the Minister of Law during the debate of the Bill, as amply reflected in the relevant Hansard:

> *Puan Fong Po Kuan*: Jadi saya harap Yang Berhormat Bagan Datok juga akan *seterusnya menyokong dan juga mencadangkan pemindaan yang lain seperti Akta Imigresen dan juga ke atas Perkara 14 dan 15 di dalam Perlembagaan Persekutuan* yang juga mendiskriminasikan Wanita yang pemindaan ke atas Perkara 8 hanya satu perkara am sahaja — general clause sahaja, dengan izin — Tuan Yang di-Pertua (see Hansard of 31.07.2001 at p 64). (Emphasis added.)
>
> *Puan Chong Eng*: Terima kasih Yang Berhormat Menteri. *Saya ingin mendapat penjelasan mengapa Perkara 8 tidak dipinda bersama-sama dengan Perkara 14 dan Perkara 15 dalam Perlembagaan kerana ini adalah berkaitan.* Dan Perkara 14 dan Perkara 15 juga mendiskriminasikan Wanita atas jantinanya. Kalau berbanding dengan Perkara 56, 57 dan 65 bahawa perkara-perkara yang berkaitan telah dipinda sekali gus tetapi di dalam Perkara 8(2) mengapa? Bolehkah Yang Berhormat Menteri menjelaskan, dan juga tadi saya ada menimbulkan bahawa dalam Bahasa Inggeris yang dipakai ialah 'gender' tetapi dalam Bahasa Malaysia ialah 'jantina' dan adakah kita akan timbangkan bahawa kedua-dua perkataan ini dimasukkan? Terima kasih. (see Hansard of 1 August 2001 at p 74) (Emphasis added.)
>
> *Datuk Seri Utama Dr. Rais bin Yatim*: Ada pepatah berkata Tuan Yang di-Pertua, 'fikiran tidak datang sekali, pandangan tidak sesaujana', *oleh itu yang difikirkan penting dahulu iaitu Perkara 8 oleh kerana Perkara 8 mengandungi asas kepada kesamarataan sedangkan Perkara 14, 15 mengenai warganegara. Hal warganegara amat rumit dan pada masa ini tidak perlu kita sentuh dahulu oleh kerana peruntukan-peruntukan khusus di bawah Undang-Undang Kewarganegaraan perlu mendapat satu penelitian yang lebih khusus* sedangkan di bawah Perkara 8(2) kita hanya perlu memberi taraf sama rata kepada Wanita (see Hansard of 1 August 2001 at p 74). (Emphasis added.)

[130] Therefore, it was made clear in Parliament that Act A1130, which introduced the word 'gender' in art 8(2), was not intended to alter or affect the operation of arts 14 and 15 of the Constitution. The Minister has clearly stated that citizenship matters are complex and requires specific and detailed studies.

[131] In any event, as can be seen from the Hansards, the parliamentary debates on Act A1130 revolved mainly on aspects of appointment, employment, acquisition, holding or disposition of property or the establishment or carrying on of trade, business, profession or vocation. As clearly stated by the Minister, citizenship matters are clearly excluded.

[132] It is also trite that Parliament is taken to know the law before it makes such amendment (see *Abdullah bin Atan v Public Prosecutor and other appeals* [2020] 6 MLJ 727; [2020] 9 CLJ 151). When Parliament amended art 8(2) in 2001 via Act A113, Malaysia had already acceded to CEDAW in 1995. However, it must be noted that Malaysia had made express reservations in respect of provisions relating to citizenship in CEDAW, in particular to art 9(2) of CEDAW which provides that 'State Parties shall grant women equal rights with men with respect to the nationality of their children'. The reservation is that 'Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Syaria' law and the Federal Constitution of Malaysia' (see Depository Notification C.N.250.1995 and Depository Notification C.N.82.1998).

[133] Therefore in amending the FC to include 'gender' in art 8(2), Parliament was acutely aware of the existing reservation of the GOM in relation to the citizenship provisions in CEDAW. As such, the amendment to art 8(2) of the FC was intended not to have any bearing on the provisions on citizenship in Part III of the FC. It follows that there is no seeming conflict between art 8(2) and art 14(1)(b) read with s 1(b), Part II of the Second Schedule of the FC.

[134] Added to that, the issue of gender discrimination had already been addressed by the Federal Court in *CTEB*, where it is held that:

> [197] A student of constitutional law will appreciate that not all forms of discrimination are protected by art 8. Article 8 opens with 'Except as expressly authorised by this Constitution'. In short, discrimination authorised by the FC is not a form of discrimination that art 8 seeks to protect. There are in fact a number of discriminatory provisions expressed in the FC which include art 14. Since the discriminatory effect of art 14 is one authorised by the FC, it would be absurd and clearly lack of understanding of art 8 for any attempt to apply the doctrine of reasonable classification, to art 14.

[135] In fact, the Federal Court went on to state that it is for the Parliament to resolve the conflict by amending the Constitution in the manner as prescribed under art 159.

Issue (iv) — The application *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran*

dan Kematian, Malaysia [2022] 1 MLJ 71

[136] It is the submission of the applicants that the latter Federal Court decision of *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia* [2022] 1 MLJ 71 ('CCH') has affirmed the minority judgment in *CTEB*, rendering the majority decision in *CTEB* to be no longer applicable nor binding on this court.

[137] On this issue, the applicants' submission in Appeal 531 reads as follows:

> 143. Reading *CCH* as a whole and understanding the underlying concepts and principles, it can be safely concluded that the minority judgement in *CTEB* was unanimously affirmed, explicitly and implicitly, by the 5-0 majority in *CCH* where the Federal Court employed a wide interpretation when interpreting the FC. *The majority dictum in CTEB is therefore no longer applicable nor binding on this Honourable Court as a later Federal Court decision on the same point of law would prevail over the former*: *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 (FC). (Emphasis added.)

[138] In *Dalip Bhagwan Singh v Public Prosecutor*, Peh Swee Chin FCJ held that the Federal Court was vested with the power to depart from its own previous decision, but such power must be used sparingly:

> [1c] Although the Practice Statement (Judicial Precedent) 1966 issued by the House of Lords is not binding on the Federal Court, it has, indeed, and in practice, been followed. *The Federal Court (and its forerunner the Supreme Court) has never refused to depart from its own previous decisions when it appeared right to do so. This power to depart should be, and always has been, exercised sparingly. In contrast, the power to depart is indicated when a previous decision sought to be overruled is wrong, uncertain, unjust, outmoded or obsolete in modern conditions.*
>
> [1d] The effect or weight of a decision of a panel of the Federal Court comprising more than three members or a 'full court' and that of an ordinarily constituted quorum comprising three members is the same.
>
> [1e] *When two decisions of the Federal Court conflict, on a point of law, the later decision prevails over the earlier decision.* (Emphasis added.)

[139] In *Tai Chai Yu v The Chief Registrar of The Federal Court* [1998] 2 MLJ 474, this court stated as follows:

> A final decision of the Federal Court, once pronounced, is binding upon the parties thereto *and its correctness may only be questioned in a subsequent case where the identical point of law arises for a decision.* (Emphasis added.)

[140] The issue then is whether the cases of *CTEB* and *CCH* are in conflict on the same point of law. In *CCH* case, the child was born and abandoned at

Hospital Universiti Kebangsaan Malaysia, Cheras. The appellants jointly decided that they would adopt the child and named him CYM. The issue before the High Court and the Court of Appeal is whether the child, who was born in Malaysia is a Malaysian citizen by operation of law, pursuant to art 14(1)(b), Part II, s 1(a) and/or 1(e) read together with s 2(3) of the Second Schedule of the FC. The appellants took the position that word 'parents' in art 14(1)(b) and s 1(a) of Part II of the Second Schedule included the legal parents of a child and not limited to the natural parents only. Both the High Court and the Court of Appeal held, inter alia, that the word 'parents' in s 1(a) of Part II, Second Schedule means the natural parents at birth, not the adoptive parents.

[141] On appeal to the Federal Court, the Federal Court was asked to answer the following questions:

> [37] In light of the above arguments and the decisions rendered thereupon, the appellants sought leave to appeal to this court. The five questions ('leave questions') which were allowed are these:
>
> *Question 1*
>
> Whether a child who (i) was born in Malaysia and (ii) did not acquire citizenship of any other country within one year from his date of birth, is a citizen of Malaysia by operation of law pursuant to art 14(1)(b) *and Part II s 1(e) and Section 2(3) of the Second Schedule of the Federal Constitution?*
>
> *Question 2*
>
> Whether Part II s 1(e) of the Second Schedule of the Federal Constitution requires a child to prove the identity of his/her biological parents and/or that they are not foreign citizens?
>
> *Question 3*
>
> Whether the word 'parents' in Part II s 1(a) of the Second Schedule of the Federal Constitution should be given a restrictive interpretation to mean only the child's biological parents?
>
> *Question 4*
>
> Whether a certificate of birth issued under s 25A of the Adoption Act 1952 shall pursuant to subsection (5) 'for all purposes be known as the Certificate of Birth of the child' and pursuant to subsection (6) 'shall be received without further or other proof as evidence' of the child's parents for the purposes of art 14(1)(b) and Part II s 1(a) of the Second Schedule of the Federal Constitution?
>
> *Question 5*
>
> Whether a birth certificate which has been 'surrendered' to the Registrar General of Births and Deaths pursuant to s 25A(1)(b) of the Adoption Act 1952 and 'replaced' by a new birth certificate issued pursuant to s 25A(5) of the Adoption Act 1952, can still be referred to by the Registrar General of Births and Deaths

or the courts for the purposes of determining the child's 'parents'?

Our Decision/Analysis

Whether The Child Is Entitled To citizenship By Operation Of Law The Scope Of The Arguments

38 We begin our analysis by recording our gratitude to learned counsel for the appellants, Dato' Dr Cyrus Das, for his efforts in meticulously taking us through the legislative history leading up to the insertion of the provisions of ss 1(e) and 2(3) of Part II and s 19B of Part III into the FC. Without expressly setting out those provisions, we accept that the speeches and debates that took place in Parliament in respect of those amendments clearly establish that the purpose of their insertion was to guard against statelessness. We also commend learned counsel for the arguments he advanced on s 1(a) in relation to the interpretation of the phrase 'parents' therein appearing and how it includes 'adoptive' parents.

39 That said, one will notice that we have taken great pains to state the facts of this case in as much detail as possible. After considering the facts of this case in light of the submissions made, *we are of the considered view that none of the leave questions need be considered or answered. This is because the peculiar facts and circumstances of this case do not call for such deliberation.* (Emphasis added.)

[142] Even though the questions raised in *CCH* case is on the interpretation of art 14(1)(b) read with s 1(a) and 1(e) of the Second Schedule of the FC, the Federal Court did not decide on this issue. Instead the Federal Court proceeded to look at s 1(a) of Part II and s 19B of Part III:

[42] It is our considered view that *the child in this case is entitled to citizenship by operation of law pursuant to s 1(a) of Part II read together with s 19B of Part III.* Although we have already set out the provisions earlier, for ease of reference, we set out both ss 1(a) and 19B together again, as follows:

Section 1(a) of Part II:

1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:

(a) every person born within the Federation of whose parents one at least is at the time of birth either a citizen or permanently resident in the Federation; and ...

Section 19B of Part III:

19B. For the purposes of Part I or II of this Schedule any newborn child found exposed in any place shall be presumed, until the contrary is shown, to have been born there of a mother permanently resident there; and if he is treated by virtue of this section as so born, the date of the finding shall be taken to be the date of the birth. (Emphasis added.)

[143] The Federal Court then held that the operative words in s 19B 'any new born child found exposed in any place' are to include a child abandoned at the place of birth by the birth mother whose identity is unknown.

[144] Therefore, the Federal Court in *CCH* did not decide on the same provisions of the FC as in *CTEB*'s case. I am of the considered opinion that the cases of *CTEB* and *CCH* are not in conflict on the same point of law, as the decision of *CCH* is on s 1(a) of Part II read together with s 19B of Part III. As such, the latter case of *CCH* did not overrule *CTEB* on the interpretation of art 14(1)(b) read with s 1(b) of Part II, Second Schedule of the FC.

Issue (v) — Application of International Conventions (CEDAW)

[145] It is the submission of the applicants that in interpreting the application of art 8 of the FC and its interplay with other provisions of the FC, including art 14(1)(b) read with s 1(b) of Part II, Second Schedule of the FC, and the various international commitments that the GOM had made, especially the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW') are highly relevant as an aid to interpretation. The applicants relied on the case of *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors* [2012] 1 MLJ 832 where the High Court held that CEDAW is binding on Malaysia and therefore the court is obligated to have regard to the Malaysian obligation under CEDAW.

[146] The case of *Noorfadilla bt Ahmad Saikin* was considered by the Court of Appeal in *AirAsia Bhd v Rafizah Shima bt Mohamed Aris* [2014] 5 MLJ 318; [2015] 2 CLJ 510 where this court reiterated the well-established principle that without an express incorporation into domestic law by an act of Parliament following ratification of CEDAW, the provisions of CEDAW do not have any binding effect. This is insofar as domestics enforceability of treaty provisions in concerned. This court also held that the practice in Malaysia with regard to the application of international law is that the Executive possesses the treaty-making capacity while the power to give effect domestically rests with Parliament. For a treaty to be operative in Malaysia, therefore, it requires legislation by Parliament. Since CEDAW is not part of the municipal law, the decision in *Noorfadilla bt Ahmad Saikin* is legally incoherent.

[147] In fact, the Federal Court in *Bato Bagi & Ors Kerajaan Negeri Sarawak and another appeal* [2011] 6 MLJ 297; [2011] 8 CLJ 766 held that international treaty should not be used as a guide to interpret the FC. Raus Sharif FCJ said as follows:

> [180] On the issue whether this court should use 'international norms' embodied in the UNDRIP to interpret arts 5 and 13 of the Federal Constitution I have only this to say. *International treaties do not form part of our law, unless those provisions have*

been incorporated into our law. We should not use international norms as a guide to interpret our Federal Constitution. Regarding the issue of determining the constitutionality of a statute, Abdul Hamid Mohamad PCA (as he then was) in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 at p 17; [2007] 6 CLJ 341 at p 355 had this to say:

> *So, in determining the constitutionally or otherwise of a statute under our Constitution by the court of law, it is the provision of our Constitution that matters,* not a political theory by some thinkers. As Raja Azlan Shah FJ (as his Royal Highness then was) quoting Frankfurter J said in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187; [1975] 1 LNS 90 (FC) said: 'The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it'. (Emphasis added.)

[148] In any event, the GOM has expressly made reservation to art 9(2) of CEDAW, in relation to equal rights of women with men in relation to the nationality of their children. The basis of the reservation is that the provision of art 9(2) is in conflict with the entrenched and fundamental provisions on citizenship in the FC. In light of Malaysia's reservation to art 9(2) of CEDAW, the issue on equality of rights therein cannot be said to be applicable in interpreting the provisions on citizenship in the FC.

CONCLUSION

[149] Premised on the reasons enumerated above, I am of the considered opinion that the word 'father' in s 1(b), Part II, Second Schedule simply means the biological father. It does not mean 'mother' or 'parents'. Therefore, under art 14(1)(b) read with s 1(b), Part II of the Second Schedule, every person born outside the Federation whose father is at the time of birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State, are citizens of this country by operation of the law.

[150] In the present appeals, since the applicants' biological fathers are not Malaysian citizens, they are not entitled to the Malaysian citizenship by operation of law under art 14(1)(b) of the Federal Constitution.

[151] As such, I am of the considered opinion that the learned judge in Appeal 531 has committed an appealable error that warrant an appellate intervention. I would hereby allow the appeal in Suit 531 and set aside the decision of the learned judge. On the same reasoning, Appeal 273 must be dismissed.

[152] There will be no order as to costs.

Nantha Balan JCA (delivering dissenting judgment of the court):

INTRODUCTION

[153] There are two appeals before us, namely Appeal No W-01(A)-273–06 of 2020 ('Appeal 273') and Appeal No W-01(NCvC)(A)-531–09 of 2021 ('Appeal 531'). Both appeals arise from gender discrimination cases pursuant to claims made by plaintiffs who filed applications via originating summons in the High Court for declarations in regard to citizenship (by operation of law) under the Federal Constitution for children born overseas to Malaysian mothers and where the fathers are non-Malaysians.

[154] At the outset, it is relevant to mention that the individuals involved in these appeals who are seeking citizenship (by operation of law) are not children who were abandoned or illegitimate at the time of their birth. They were all born outside the Federation of Malaysia to their respective mothers, who are Malaysian citizens, and where their fathers are non-citizens.

[155] The gender discrimination arises in the context of the inability of a Malaysian mother who is married to a foreigner (non-Malaysian citizen) to pass on her citizenship status (*jus sanguinis*) to her child who is born outside the Federation of Malaysia.

[156] On the other hand, a Malaysian father who is married to a foreign wife is able to automatically pass on his citizenship (*jus sanguinis*) to his child born overseas. This conundrum arises from the patrilineal gender-discriminatory wording of s 1(b) of Part II of the Second Schedule under art 14(1)(b) of the Federal Constitution.

[157] The appeals essentially concern art 8(2) of the Federal Constitution which proscribes discrimination against Malaysian citizens based on, inter alia, gender, and its overarching impact on the conferment of Malaysian citizenship by operation of law under art 14(1)(b) of the Federal Constitution read with s 1(b) of Part II of the Second Schedule. It is perhaps relevant to keep at the forefront of our minds that art 8(2), which deals with 'equality', is found within Part II of the Federal Constitution, which deals with the 'fundamental liberties'. Another important provision of the Federal Constitution is art 5, which deals with 'liberty of the person'.

THE FEDERAL CONSTITUTION

[158] The main provisions of the Federal Constitution (with emphases added) which arise for consideration for present purposes are:

Article 5

Liberty of the person

(1) No person shall be deprived of his life or personal liberty save in accordance with law.

Article 8 Equality

(1) *All persons* are equal before the law and entitled to the equal protection of the law.

(2) *Except as expressly authorised by this Constitution*, *there shall be no discrimination against citizens* on the ground only of religion, race, descent, place of birth or *gender in any law* or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

[Am. *Act A1130*] [w.e.f. *28 September 2001*]

(3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State.

(4) No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.

(5) *This Article does not invalidate or prohibit* —

(a) any provision regulating *personal law*;

(b) any provisions or practice restricting office or employment connected with the *affairs of any religion or of an institution managed by a group professing any religion*, to persons professing that religion;

(c) any provision for the protection, *well-being or advancement of the aboriginal peoples* of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;

(d) *any provision prescribing residence in a State or part of a State* as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election;

(e) any provision of a *Constitution of a State*, being or corresponding to a provision in force immediately before Merdeka Day;

(f) any provision *restricting enlistment in the Malay Regiment to Malays*.

Article 14

Citizenship by operation of law

(1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:

(a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part I of the Second Schedule; and

(b) *every person born on or after Malaysia Day*, and having any of the qualifications specified in *Part II* of the *Second Schedule*.

SECOND SCHEDULE

PART II

[Article 14(1)(b)]

Citizenship by operation of law of persons born on or after Malaysia day

1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:

(a) every person born within the Federation of whose parents one at least is at time of the birth either a citizen or permanently resident in the Federation; and

(b) *every person born outside the Federation whose father is at the time of the birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State*; and

(c) every person born outside the Federation whose father is at the time of the birth a citizen and whose birth is, within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow, registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di-Pertuan Agong, registered with the Federal Government; and

(d) every person born in Singapore of whose parents one at least is at the time of the birth a citizen and who is not born a citizen otherwise than by virtue of this para; and

(e) every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this para.

2(1) A person is not a citizen by virtue of paragraphs (a), (d) or (e) of s 1 if, at the time of his birth, his father, not being a citizen, possesses such immunity from suit and legal process as is accorded to an envoy of a sovereign power accredited to the Yang di-Pertuan Agong, or if his father is then an enemy alien and the birth occurs in a place under the occupation of the enemy.

(2) In s 1 the reference in paragraph (b) to a person having been born in the Federation includes his having been born before Malaysia Day in the territories comprised in the States of Sabah and Sarawak.

(2) For the purposes of paragraph (e) of s 1 a person is to be treated as having at birth any citizenship which he acquires within one year afterwards by virtue of any provisions corresponding to para (c) of that section or otherwise.

[159] The plaintiffs' position is that a child who is born overseas to a mother

who is a Malaysian citizen and whose father is not a Malaysian citizen is entitled to Malaysian citizenship as of right, ie, by operation of law. However, the Director-General of the National Registration Department, the Minister of Home Affairs and the Government of Malaysia, as the appellants in Appeal 531 and respondents in Appeal 273 (collectively, 'the Government'), contend otherwise.

[160] Pursuant to Amendment Act A1130, which came into effect on *28 September 2001*, *art 8(2)* of the Federal Constitution was amended, and *protection from gender discrimination* was *granted to all Malaysian citizens*, *unless such discrimination was expressly authorised by the Federal Constitution itself*. Thus, under the amended art 8(2) of the Federal Constitution gender discrimination was *constitutionally proscribed* unless such discrimination was 'expressly' authorised by the Federal Constitution itself so as to legitimise the gender discrimination found in art 14(1)(b) read with s 1(b), Part II, Second Schedule.

[161] It is perhaps necessary to mention at this juncture that despite the 2001 amendment to art 8(2), Parliament did not amend art 8(5) to include any provision relating to 'matters concerning citizenship'. And further, Parliament did not also amend art 14(1)(b) to insert a *non-obstante* clause which would read as 'Notwithstanding art 8(2)'. Counsel for the plaintiffs said that if art 8(5) had been amended to include 'matters concerning citizenship', or if art 14(1)(b) had been amended to include a *non-obstante* clause, then the gender discrimination per art 14(1)(b) of the Federal Constitution read with s 1(b) of Part II of the Second Schedule could be interpreted as having been expressly authorised by art 8(2), but not otherwise.

[162] It was argued by the learned senior federal counsel ('SFC') on behalf of the Government that art 14(1)(b) of the Federal Constitution read with s 1(b) of Part II of the Second Schedule is not in conflict with art 8(2) and that the words in that provision are clear and unambiguous and the use of the word 'father' in s 1(b) is deliberate and context sensitive.

[163] According to the SFC, art 14(1)(b) of the Federal Constitution read with s 1(b) of Part II of the Second Schedule was not meant to connote 'mother' and therefore precludes a Malaysian mother who is married to a foreigner (non-Malaysian citizen) from passing on her citizenship status via the *jus sanguinis* principle to her child born outside the Federation of Malaysia. According to the SFC, the framers of the Federal Constitution had addressed their minds to this issue and that this is exactly what they had originally intended.

[164] The SFC implicitly acknowledged that the current problem is a legacy

created by the original framers of the Federal Constitution. The SFC quoted from the judgment of the Supreme Court of the United Kingdom in *Romein v Advocate General for Scotland* [2018] 2 All ER 849; 2018 SLT 790; [2018] 2 WLR 672; 2018 SC (UKSC) 122; [2018] AC 585; [2018] UKSC 6; [2018] WLR(D) 84, where Lord Sumption said at para 4, 'The exclusion of claims to British citizenship by descent through the female line is a curious survivor of redundant social and political priorities'. The SFC described art 14(1)(b) of the Federal Constitution read with s 1(b) of Part II of the Second Schedule as the product of what was historically intended by the framers of the Federal Constitution.

[165] In this regard, the SFC made copious references to various historical documents to make the point that the intention behind art 14(1)(b) of the Federal Constitution read with s 1(b) of Part II of the Second Schedule is clear and unambiguous and should not be jettisoned as this would result in the Federal Constitution being 're-written' via 'judicial legislation' under the guise of a harmonious, organic or beneficent interpretation of the Federal Constitution, resulting in the word 'father' appearing in s 1(b) of Part II of the Second Schedule to be read as including 'mother'. The SFC said that when the words of the Federal Constitution are clear and unambiguous, there is no scope for the use of interpretative tools such as harmonious interpretation or the organic theory of interpretation.

[166] Thus, in so far as these appeals are concerned, the question of constitutional, societal and practical importance is whether, after art 8(2) of the Federal Constitution was amended, ie, post-28 September 2001, art 14(1)(b) read together with s 1(b) of Part II of the Second Schedule is to be interpreted in such a manner as to be consistent with and not contrary to art 8(2), with the result that a child who is *born overseas* to a *mother who is a Malaysian citizen* ('Malaysian mother') attains citizenship *by operation of law*, notwithstanding that the child's *father* is *not* a Malaysian citizen.

[167] The appellant in Appeal 273 and the respondents in Appeal 531 took a common stand and urged this court to interpret art 14(1)(b) of the Federal Constitution read together with s 1(b), Part II, Second Schedule of the Federal Constitution in a manner which is harmonious with the gender equality provision in art 8(2) and sought a declaration that a child born overseas to a Malaysian mother attains Malaysian citizenship by operation of law notwithstanding that the father is not a Malaysian citizen.

[168] On the other hand, the Government interprets art 14(1)(b) of the Federal Constitution read with s 1(b) of Part II of the Second Schedule as discrimination which is expressly authorised by the Federal Constitution itself. In gist, the Government contends that art 8(2) has not been contravened. The

Government contends that gender discrimination as per art 14(1)(b) of the Federal Constitution read with s 1(b) of Part II of the Second Schedule is one which is permitted or countenanced by the very equality provision in the Federal Constitution which proscribes gender discrimination.

[169] In this judgment, 'Malaysian mother' means a woman who is a Malaysian citizen with children who were either born in Malaysia or outside the Federation of Malaysia. The appellants in Appeal 531 and respondents in Appeal 273 shall be referred to collectively as 'the Government'. The respondents in Appeal 531 and the appellant in Appeal 273 shall be referred to collectively as 'plaintiffs'. Where the context requires, the sole appellant in Appeal 273 shall be 'Mahisha'.

THE PROBLEM

[170] If a Malaysian mother marries a foreigner and bears a child from the said union, and the child happens to be *born within the Federation of Malaysia,* then that *child is automatically accorded citizenship by operation of law* under art 14(1)(b) of the Federal Constitution read together with s 1(b), Part II, Second Schedule. However, the issue of citizenship becomes acutely problematic *if the said Malaysian woman delivers her child overseas*, because according to the Government's interpretation of art 14(1)(b) of the Federal Constitution read with s 1(b), Part II of the Second Schedule, the *child is not a citizen by operation of law*. The Government contends that the said child, who was born overseas to a Malaysian mother and a non-citizen father, has to 'apply' for citizenship (art 15 of the Federal Constitution). Thus, there is no certainty and the fate of the child's citizenship and whether the child will even be granted citizenship (or not) is entirely at the discretion of the Government.

[171] It is quite obvious that the Government's position is predicated on the plain and literal reading of the wording of the provisions of the Federal Constitution. The Government has not offered any evidence to justify the discrimination against Malaysian mother who are married to foreigners and whose children are born overseas. I shall therefore proceed on the footing there is no justification whatsoever for the gender discrimination. Hence, other than the historical origins of the Federal Constitution, there is patently no logical or rational basis or justification for denying citizenship to a child born overseas to a Malaysian mother whose husband is a foreigner.

[172] As I said, the Government relies heavily on the history of the Federal Constitution to justify the perpetuation of gender discrimination against Malaysian mothers who are married to foreigners and whose children are born overseas. In this regard, the majority judgment of the Federal Court in *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 4 MLJ

236; [2021] 5 AMR 661; [2021] AMEJ 0708; [2021] 6 CLJ 471 (FC) ('CTEB') alluded to this aspect of constitutional interpretation and opined at para 76 that 'legislative history plays an important role in interpreting and understanding the context of a constitutional provision'. A

[173] In *CTEB*, the child was born overseas to a Malaysian father and a Filipino mother. The parents were not married at that point in time when the child was born. The parents got married about four months after the child was born. In that case, the Federal Court (by majority) ruled that the child, who was illegitimate at the time of his birth, could not take the citizenship of his Malaysian father and was limited to the lineage of his non-citizen mother. B C

[174] It was held that the subsequent legitimation of his parents' marriage was immaterial to the construction of art 17, which qualified s 1(b) of the Second Schedule to the Federal Constitution. In the opinion of the majority, legitimacy must be referenced to the date of the child's birth and not when the application for citizenship was made. The minority view in *CTEB* was to the contrary. D

[175] In regard to the issue of the role of legislative history, it is I think, apt to quote from an article authored by Emeritus Professor Datuk Dr Shad Saleem Faruqi — *Case Commentary on Suriani Kempe v Kerajaan Malaysia* [2021] 4 MLJ cxlix where the author, an expert on Malaysian constitutional law, lamented, 'Like all Constitutions, some provisions of our 64-year old Constitution reflect our patriarchal past'. The author then went on to express his sanguine hope for development in regard to the interpretation of the Federal Constitution vis a vis citizenship by operation of law. He said: E F

> All Constitutions are born at a particular time in history and necessarily reflect the existentialist realities of their time and place. At the same time, a good Constitution must hitch itself to the stars; it must be aspirational and must contain seeds of change for a better tomorrow. G
>
> ...
>
> Finally, it is submitted that the constitutional provisions on citizenship drafted 64 years ago cannot remain static. Their interpretation must be guided by the fresh flows generated by the constitutional amendment of art 8(2). The 2001 provision on gender equality is not a window-dressing but a mighty tributary whose waters are meant to enrich all other streams of the law. H

[176] In this regard, the relevant parties in both appeals (Mahisha and the overseas born children of the second to seventh respondents in Appeal 531) have all applied for citizenship under art 15 of the Federal Constitution and the applications were either rejected or were still being processed after re-applying. The plaintiffs then filed applications via originating summonses to obtain I

declaratory orders in regard to the status of the children as citizens of the Federation of Malaysia by operation of law. The Government took umbrage with these applications in court, and contended that, having failed in their art 15 applications, it was an abuse of process for the plaintiffs to seek declaratory remedies pursuant to art 14 of the Federal Constitution.

[177] In my view, if the protagonists of the originating summonses are correct in their contention that the affected children are citizens by operation of law, then this would mean that they ought not to have made the art 15 applications in the first place. Those applications would be irrelevant as they were unnecessary.

[178] At any rate, having failed in obtaining citizenship by the art 15 route, I know of no principle of law or procedure which precludes the parties from moving the court for declaratory orders anchored on art 14(1)(b) of the Federal Constitution read with s 1(b), Part II, Second Schedule, which they fervently believe entitles the children to citizenship by operation of law. The argument that was taken on behalf of the Government that the applications are a manifestation of abuse of process is totally misplaced and should not even have been brought up in the first place, especially since the applications concern their precious right to be accorded citizenship by operation of law.

[179] I move on now to the context in which both appeals have come before this court. According to the Government, children born overseas to Malaysian mothers and whose fathers are non-citizens are not entitled to citizenship by operation of law.

[180] Essentially, based on the Government's interpretation of the relevant provisions of the Federal Constitution, a child born overseas attains citizenship of the Federation of Malaysia by operation of law regardless of the mother's citizenship, *provided the father is a Malaysian citizen*. However, *the ability to pass on her citizenship by descent is not similarly available to a Malaysian mother (married to a foreigner) whose child is born overseas*.

[181] It is the Government's submission that there is no violation of art 8(2) of the Federal Constitution, albeit that Malaysian mothers (who are married to non-citizens) are precluded from passing on their citizenship to their children who are born overseas, as it is contended that this type of gender discrimination is expressly authorised by the Federal Constitution via art 14(1)(b) of the Federal Constitution read together with s 1(b), Part II, of the Second Schedule.

[182] Of course, the Government's interpretation of the provisions of the Federal Constitution is that there is no violation of art 8(2) because this has (apparently) been expressly authorised by the Federal Constitution. But the

Government's interpretation has been vehemently disputed by the plaintiffs. A

[183] In my view, it is untenable for the Government to say that there is no discrimination against Malaysian mothers who are unable to pass on their citizenship to their children who are born overseas. There is no doubt that, art 14(1)(b) read together with s 1(b), Part II, Second Schedule of the Federal Constitution is totally and inherently discriminatory of the rights of Malaysian mothers whose children are deprived of citizenship by operation of law solely because their spouses are foreigners and because the children were born overseas. B C

[184] One of the issues here is whether, as a matter of constitutional interpretation, the Government is entitled to rely on the opening words of art 8(2) which read: 'Except as expressly authorised by this Constitution …', to contend that art 14(1)(b) read together with s 1(b), Part II, Second Schedule of the Federal Constitution, is a constitutionally-mandated discrimination. It follows therefore that if the Government is not entitled to rely on the opening words of art 8(2) to preclude the gender discrimination inherent in art 14(1)(b) read together with s 1(b), Part II, Second Schedule of the Federal Constitution, then the result will be that the said gender discrimination against Malaysian mothers would be one which is contrary to art 8(2) and therefore unconstitutional. D E

[185] Putting it in context, the ultimate question is whether Mahisha, the appellant in Appeal 273, and the affected children of the second to seventh respondents (respondents in Appeal 531), who were born overseas to Malaysian mothers and whose fathers are non-citizens, is/are Malaysian citizens by operation of law under art 14(1)(b) read together with s 1(b), Part II, Second Schedule of the Federal Constitution. F G

[186] Critically, the issue boils down to whether the Government's interpretation of art 14(1)(b) read together with s 1(b), Part II, Second Schedule of the Federal Constitution results in or is a manifestation of gender discrimination contrary to or, alternatively, is in conformity with art 8(2) of the Federal Constitution. H

[187] Flowing from the above, the next critical question is whether there is a conflict between art 8(2) and art 14(1)(b) read together with s 1(b), Part II, Second Schedule of the Federal Constitution and whether such conflict may be resolved or ameliorated by resorting to the principle of harmonious interpretation and/or the organic theory of interpretation of constitutional provisions coupled with the use of interpretation provisions of the Federal Constitution, ie art 160(1) and s 2(94) of the Eleventh Schedule to the Federal Constitution, to construe the word 'father' in art 14(1)(b) read together s 1(b), I

Part II of the Second Schedule of the Federal Constitution as meaning *either parent*, that is, the *father or the mother* so as to be properly aligned with art 8(2) of the Federal Constitution and thereby obviate any form of gender discrimination against Malaysian mothers.

APPEAL 273

[188] In Appeal 273, Mahisha is appealing against the decision of the learned judge dated 21 May 2020, dismissing her application via Originating Summons No WA-24–73–12 of 2019 dated 2 December 2019 ('OS73') for a declaration that she is, by operation of law, a citizen of the Federation of Malaysia. The undisputed facts in so far as they are relevant to OS73 (Appeal 273) are as follows:

(a) Mahisha was born on 1 October 1997 at St Isabel Hospital Chennai, India;

(b) Mahisha's biological parents are Masnah Banu bt Kamal and Abdul Majeed Gani;

(c) Mahisha's parents were married under the laws of India on 10 June 1996;

(d) they subsequently registered their marriage on 27 December 2005 at the *Pejabat Agama Islam*, District of Kulim, Kedah;

(e) Mahisha's parents and Mahisha returned to Malaysia in 2005;

(f) Mahisha has two siblings, namely Shafeeudeen bin Abdul Majeed and Shafia bt Abdul Majeed, who were born in Malaysia on 25 August 2006 and 27 November 2007 respectively;

(g) both her siblings are Malaysian citizens;

(h) Mahisha married Mohamed Naveen Sheik Mohideen ('Naveen') (Republic of India Passport No H5607785) on 12 August 2016 at *Jabatan Agama Islam Wilayah Persekutuan* under the Islamic Family Law (Federal Territories) Act 1984;

(i) Mahisha and Naveen have a son, Mohamed Shaik Farhan ('Farhan'), who was born on 20 July 2018 at Ipoh Specialist Hospital. As both Mahisha and Naveen are Indian citizens, Farhan is registered as a non-citizen on his birth certificate.

[189] The prayers sought in OS73 are as follows:

(a) a declaration that (Mahisha) is a citizen of Malaysia by operation of law by virtue of the citizenship of her mother, Masnah Banu bt Kamal (NRIC No 720329–02–6253) pursuant to art 14(1)(b), s 1(b), Part II of the Second Schedule of the Federal Constitution;

(b) a declaration that the word 'father' in art 14(1)(b), s 1(b), Part II of the Second Schedule of the Federal Constitution shall be interpreted to mean either parent, that is, father or mother;

(c) a declaration that the Government's failure, refusal or omission to recognise (Mahisha) as a citizen of Malaysia contravenes art 8 of the Federal Constitution; and

(d) an order that the (Government) issues (Mahisha) with a NRIC/MyKad or a Certificate of Confirmation of Status of citizenship which confirms (Mahisha) as a citizen of Malaysia within 14 days from the date of service of the court's order on the (Government).

APPEAL 531

[190] In Appeal 531 the Government is appealing against the decision of the learned judge dated 27 September 2021 in allowing the respondents' (plaintiffs') application via amended Originating Summons No WA-24NCvC-2356–12 of 2020 dated 19 August 2021 ('AOS 2356').

[191] The relevant facts are as follows:

(a) the first respondent, Suriani Kempe, is the president and office bearer of a non-profit society, (Association of Family Support and Welfare Selangor and Kuala Lumpur (Family Frontiers) ('FF')), registered under the Societies Act 1966. She filed AOS 2356 for and on behalf of FF and its members. FF's mission is to advance, promote, strengthen and support family unity and development. The second to seventh respondents are Malaysian mothers who are married to foreign spouses and who have given birth to children overseas/outside Malaysia;

(b) the defendants were the Government of Malaysia, the Minister of Home Affairs and the Director-General of the National Registration Department;

(c) in AOS 2356, the plaintiffs sought a declaration for children born out of the Federation of Malaysia to mothers who are Malaysian citizens, to be conferred citizenship by operation of law;

(d) the plaintiffs submitted that art 14(1)(b), read together with s 1(b), Part II of the Second Schedule of the Federal Constitution, is discriminatory towards mothers who are Malaysian citizens whose children are born out of the Federation of Malaysia; as the impugned provisions only confer citizenship to children born out of the Federation of Malaysia to fathers who are Malaysian citizens; and

(e) the common predicament faced by these mothers, which formed the subject matter of AOS 2356, is as follows:

(i) their children born overseas are not citizens of Malaysia by operation of law;

(ii) they had, prior to this action, applied for their children's citizenship by registration pursuant to art 15(2) of the Federal Constitution and their applications were rejected after long delays without any reasons given;

(iii) they had also collectively re-applied for their children's citizenship by registration but they did not receive any response from the Government after a few years;

(iv) despite the High Court's decision, there has been no change to the plaintiffs' applications;

(v) as a result, their children, who are dependent on them as mothers, have been living in Malaysia since birth as foreigners;

(vi) where the mothers have multiple children, the children born in Malaysia were conferred Malaysian citizenship by operation of law while those born outside Malaysia (though they share the same multinational parents) are residing in Malaysia as foreigners;

(vii) these non-citizen children, despite being brought up and living in Malaysia, perennially suffer from the following difficulties in life:

(1) they are unable to enrol and/or were refused enrolment in public schools due to their non-citizen status;

(2) they are being charged substantially more at public establishments, including Malaysian public healthcare facilities due to their non-citizen status; and

(3) they and their families endure constant mental and emotional stress caused by, amongst others, fear of being separated from their families and being ostracised in social settings.

(viii) their predicament was recently exacerbated by the Covid-19 pandemic, where the Government had stopped all international travel in and out of the country;

(ix) this resulted in these mothers being separated from their non-citizen children for an indeterminate period of time;

(x) the mental and emotional distress caused to these mothers, in consequence of the mere fact that their children were born overseas and not in Malaysia, cannot be gainsaid;

(xi) the predicament faced by these mothers and their non-citizen children is expected to last on a perennial basis and would have direct adverse effects and uncertainties on the children's wellbeing, upbringing, familial relations with their siblings and future prospects in life;

(xii) the reliefs sought by the plaintiffs in the AOS 2356 are, inter alia, declarations relating to the conferment of citizenship on children born overseas in circumstances where their mothers are Malaysian citizens but their fathers are foreign citizens;

(xiii) the Government's position may be summarised as follows. Pursuant to the present practice and interpretation of the current laws adopted by the Government, the conferment of citizenship on children born overseas is governed in the following manner:

(1) children born overseas where the *father is a Malaysian citizen married to a foreign wife are entitled to citizenship by operation of law* pursuant to art 14(1)(b) read with s 1(b), Part II of the Second Schedule of the Federal Constitution; and

(2) children born overseas where the *mother is a Malaysian citizen married to a foreign husband* are *not entitled to citizenship by operation of law* and such *mothers have to apply under a discretionary process* for their children's citizenship by registration pursuant to art 15 of the Federal Constitution.

(xiv) the plaintiffs argue that there is no justification nor explanation as to why there exists such an apparent difference in terms of the issue of conferment of citizenship — be it in the Federal Constitution or any official records;

(xv) the only difference between the two circumstances above is the gender of the Malaysian parent. In short, on the critical issue of citizenship, women, when compared to men, suffer a grave disadvantage under the current interpretation and application of the law;

(xvi) as such, the plaintiffs' grievances are as follows:

(1) that the interpretation of the laws, adopted procedures and practices in place are discriminatory and, inter alia, in violation of the plaintiffs' constitutional rights under, inter alia, art 8(2) of the Federal Constitution;

(2) that, contrary to the present circumstance, a mother of a child born outside Malaysia ought to be entitled to a legitimate expectation that the Government and all relevant agencies and departments under their purview would abide by international obligations under, inter alia, the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW') and the

Convention on the Rights of the Child ('CRC'); and

(3) that as a result of such discriminatory practices and interpretation of the law, unlike their male counterparts in like circumstances, Malaysian mothers married to foreign spouses are subjected to an application processes for citizenship of their children by registration pursuant to art 15 of the Federal Constitution.

(xvii) In amplification it was contended by the plaintiffs that the applications for citizenship of their children by registration:

(1) are fraught with delays, uncertainty, unpredictability, inconsistency and arbitrariness;

(2) have no clear predictable, fair and certain provisions or procedures as to the criteria, considerations, conditions, requirements and procedures;

(3) have resulted, and often result, in rejections where no reasons or grounds for rejection are provided; as in the cases of these seven respondents;

(4) the real-life consequences experienced by these mothers include the fact that many of them have waited and struggled (to no avail) for between two to nine years for their children's Malaysian citizenship;

(5) in some cases, such as in the cases of the second respondent, the fourth respondent, sixth respondent, within a family unit, one child is granted citizenship by operation of law while the other (having applied for citizenship by registration) is denied citizenship purely by reason of his or her locus of birth (overseas), resulting in an immediate rupture in the family unit;

(6) in other cases, such as in the case of the seventh respondent, within a family unit, one child is granted citizenship by registration while the other (having similarly applied for citizenship by registration) is denied citizenship for reasons only known to the appellants, which similarly results in an immediate rupture in the family unit;

(7) furthermore, the child without Malaysian citizenship suffers added disadvantages as he/she is hampered in seeking, inter alia, the same educational, healthcare, political, travel, social and economic opportunities his or her Malaysian sibling; and

(8) the circumstance of these family units has been exacerbated by the Covid-19 pandemic as children who are not conferred citizenship are unable to travel to and from Malaysia and/or are separated from their parents and their siblings, causing grave adverse consequences for, inter alia, the mental and social well being of the affected family units.

[192] The prayers sought in AOS 2356 were as follows:

(a) a Declaration that Article 8 and Article 14(1)(b) of the Federal Constitution read with the Second Schedule, Part II, section 1(b) of the Federal Constitution ought to be interpreted organically and harmoniously so as to not result in an interpretation that Article 14(1)(b) of the Federal Constitution (read with the Second Schedule, Part II, section 1(b) of the Federal Constitution) is discriminatory and in violation of Article 8 of the Federal Constitution by conferring citizenship by operation of law on a child born outside the Federation whose father, but not the mother, is at the time of the birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State;

(b) a Declaration that Article 8 and Article 14(1)(b) of the Federal Constitution read with the Second Schedule, Part II, section 1(b) of the Federal Constitution ought to be interpreted organically and harmoniously so as to not result in an interpretation that Article 14(1)(b) of the Federal Constitution (read with the Second Schedule, Part II, section 1(b) of the Federal Constitution) is discriminatory and in violation of Article 8 of the Federal Constitution by conferring citizenship by operation of law on a child born outside the Federation whose father, but not the mother, is at the time of the birth a citizen and whose birth is, within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow, registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di-Pertuan Agong, registered with the Federal Government;

(c) a Declaration that the Second Schedule, Part II, section 1(b) and section 1(c) of the Federal Constitution should be read harmoniously with Article 8 of the Federal Constitution so as to include the mother of a child born outside the Federation in the circumstances stated in Second Schedule, Part II, section 1(b) and section 1(c) of the Federal Constitution;

(d) a Declaration that the mother of a child born outside the Federation in the circumstances stated in Second Schedule, Part II, section 1(b) and section 1(c) of the Federal Constitution has a legitimate expectation that the Defendant and all relevant agencies and departments under its purview would abide by its international obligations under, inter alia, the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW') and the Convention on the Rights of the Child ('CRC') and interpret the Second Schedule, Part II, section 1(b) and section 1(c) of the Federal Constitution to accord with the international obligations of the Defendant under, inter alia, CEDAW and CRC;

(e) a Declaration that the proviso in Article 8(2) of the Federal Constitution which reads 'Except as expressly authorised by this Constitution' only applies to Part II of the Federal Constitution and does not apply to Article 14 and 15 of the Federal Constitution;

(f) an Order that all relevant agencies and departments under the purview of the Defendant, including but not limited to the National Registration Department, Immigration Department, Ministry of Foreign Affairs, Malaysian Consulates and Malaysian Embassies issue all documents relating to citizenship (including but not limited to the National Registration Card (MyKad, MyKid, etc.) and passports) and all other documents that denotes the citizenship status of a child or children born outside the Federation whose mother is in the circumstances stated in Second Schedule, Part II, section 1(b) and section 1(c) of the Federal Constitution on the basis that such persons are citizens by operation of law if registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di-Pertuan Agong, registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di-Pertuan Agong, registered with the Federal Government;

(g) costs; and

(h) such further or other relief which this Honourable court deems fit, appropriate and just to order under, inter alia, the inherent jurisdiction of this Honourable Court.

HIGH COURT ORDER — AOS 2356

[193] In AOS 2356, the judge granted the following orders:

(a) A declaration that on the proper reading of the impugned provision the word father includes the mother and therefore the children of the second to seventh plaintiffs and all other women who are faced with similar situation are entitled to citizenship by operation of law if all the procedures similar to those followed by the father are adhered to.

(b) Time to comply with the necessary procedures are to be extended accordingly.

(c) All the authorities are directed to issue the relevant documentation to effectuate the declaration of the court.

DUAL CITIZENSHIP

[194] The Government contended that the children of the relevant respondents in these proceedings (Appeal 531), who were born overseas, had all acquired citizenship following their non-citizen father's nationality. But there appears to be some dispute as to the accuracy of the Government's contention. Thus, if the Government is correct, then none of these children are without citizenship or stateless.

[195] In my view, the children's acquisition of citizenship of another country, if at all, is quite irrelevant and has no bearing on their claim that they

are entitled to be citizens of the Federation of Malaysia by operation of law. The issue in regard to dual citizenship and its immateriality was decisively settled by the majority ruling of the Federal Court in *CTEB* (see paras 92–93 of the Federal Court's judgment). The point is a non-starter and should be laid to rest.

PLAINTIFFS' ARGUMENTS

[196] The plaintiffs contended that the Government's stand vis a vis art 14(1)(b) of the Federal Constitution read together with s 1(b), Part II of the Second Schedule, that a child who is born overseas to a Malaysian mother and whose father is a non-citizen does not attain Malaysian citizenship by operation of law is gender discriminatory and therefore contrary to art 8(2) of the Federal Constitution.

[197] It was argued that art 14(1)(b) read together with s 1(b), Part II of the Second Schedule of the Federal Constitution must not be interpreted literally and rigidly, but ought instead to be interpreted:

(a) purposively and harmoniously to give effect to the amendment made by Parliament in 2001 to art 8(2) of the Federal Constitution, which explicitly prohibits discrimination against Malaysian citizens based on gender;

(b) to give effect to Parliament's declared aim of fulfilling Malaysia's international obligations under, inter alia, CEDAW and CRC;

(c) holistically and harmoniously with all of the other provisions of the Federal Constitution;

(d) prismatically and organically — as opposed to pedantically — to accord with the evolutionary nature of a Constitution which considers present-day circumstances;

(e) in a manner which gives full recognition and effect to fundamental liberties and guarantees as prescribed in Part II of the Federal Constitution;

(f) in a manner which does not render illusory the amendment made by Parliament in 2001 to expand the scope of the equality provision in art 8(2) of the Federal Constitution — ie not to reduce Parliament's subsequent intention to amend the Federal Constitution to that of dead lumber;

(g) in a manner which does not result in the absurdity or repugnancy of any provision but aims to achieve a result which is fair and just (*Tan Kim Hock Product Centre Sdn Bhd & Anor v Tan Kim Hock Tong Seng Food Industry Sdn Bhd* [2018] 2 MLJ 1; [2018] 2 CLJ 567; [2018] 1 MLRA 631; [2018] 1 AMR 621 (FC) at paras 46–47); and

(h) in accordance with the interpretation provisions applicable to the Federal Constitution housed in s 2(94) of the Eleventh Schedule of the Federal Constitution, which provide for the construction of words importing the masculine gender to include females.

[198] Essentially, it was contended that art 8(2) of the Federal Constitution should be interpreted in such a manner as to achieve its avowed purpose of complying with Malaysia's international obligation vis a vis CEDAW (per Mary Lim FCJ in *Leow Fook Keong (L) v Pendaftar Besar Bagi Kelahiran dan Kematian, Jabatan Pendaftaran Negara, Malaysia & Anor* [2022] 1 MLJ 398; [2022] 1 CLJ 23; [2021] 1 LNS 1761; [2022] 1 AMR 23; [2021] AMEJ 1833 (FC) at para 68) and so as to ensure also that the constitutional outlawing of gender discrimination does not become a mere 'pious platitude' (*Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (FC) per Raja Azlan Shah FJ at p 188).

[199] The plaintiffs contend that citizenship provisions must be interpreted to reflect art 8 of the Federal Constitution, as fundamental liberties have been placed on a higher 'pedestal' than all the other provisions of the Federal Constitution. As such, any breach of these fundamental liberties must be viewed restrictively. Reference was made to the Federal Court's decision in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545; [2018] 2 AMR 313; [2018] 3 CLJ 145 (FC) ('Indira Gandhi'), which held:

> [154] Much emphasis has been placed on the literal meaning of the singular noun 'parent' in art 12(4). The interpretive guide in the Eleventh Schedule aside, it must be recalled that the provisions of the Constitution are not to be interpreted literally or pedantically. The principles of constitutional interpretation were lucidly summarised by Raja Azlan Shah LP in *Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 (at p 32) ...
>
> [155] This is particularly so in respect of srt 12(4), which falls under the fundamental liberties section in Part II of the Constitution. As was held in *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301:
>
> > ... *The Constitution is a document sui generis governed by interpretive principles of its own. In the forefront of these is the principle that its provisions should be interpreted generously and liberally*. On no account should a literal construction be placed on its language, *particularly upon those provisions that guarantee to individuals the protection of fundamental rights*. In our view, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II. (Emphasis added.)
>
> [156] It is against the backdrop of these principles that we consider the true

construction of art 12(4). A

[200] In so far as the organic theory of constitutional interpretation is concerned, counsel for the plaintiffs relied on the Federal Court's decision in *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener)* [2010] 2 MLJ 285; [2010] 2 CLJ 925; [2010] MLJU 30; [2010] 2 AMR 105 (FC) ('Nizar v Zambry') where the Federal Court enunciated the following principles: B

> [25] In *Minister of Home Affairs v Fisher* [1979] 3 All ER 21, the Privy Council was faced with interpreting the fundamental rights provisions of the Bermuda Constitution. It concluded by saying that these provisions 'call for a *generous interpretation avoiding the austerity of tabulated legalism, suitable to give to individuals the full measure of the fundamental rights and freedom*' (see also *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50) and this court in *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 at p 709 stated: C D
>
> > Secondly, as the judicial committee of the Privy Council held in *Minister of Home Affairs v Fisher*, a Constitution should be construed with less rigidity and more generosity than other statutes and as *sui juris, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which has been used*. In this context, it is also worth recalling what Barwick CJ said when speaking for the High Court of Australia, in *Attorney General of the Commonwealth, ex relatione McKinley v Commonwealth of Australia*: E
> >
> > > The only true guide and the only course which can produce stability in constitutional law is to *read the language of the Constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning*. F
>
> [26] NS Bindra's *Interpretation of Statutes*, (10th Ed) at p 1295 speaks of two theories of interpretation of Constitution namely, the mechanical and organic theories. At p 1296 it stated that the organic method is to be preferred. 'The *organic method requires us to see the present social conditions and interpret the Constitution in a manner so as to resolve the present difficulties*'. From the authorities cited above *our courts are inclined to the organic theory in the interpretation of the Constitution*. G
>
> [27] One other important guide in interpretation of Constitution is that, *The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions*. It is an established canon of constitutional construction that *no one provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument*. An elementary rule of construction is, that if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous. H I

[201] It was submitted for the plaintiffs that the literal and pedantic

A interpretation contended by the Government ought not to be applied in interpreting the Federal Constitution (see the Federal Court case of *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 3 AMR 101; [2019] AMEJ 0208; [2019] 3 MLRA 1; [2019] 5 CLJ 780 (FC)). According to the plaintiffs, if the literal approach as suggested by the B Government is to be adopted, the court's role will be downgraded to rubberstamping the provision as enacted without actually addressing its mind to the actual purpose for which the provision was enacted or applying the provision in a fair and just manner. Counsel argued that the Federal Constitution cannot be read disjointedly but must be applied and interpreted C in an orderly and harmonious manner.

[202] Further, all provisions are to be interpreted harmoniously and purposively so as not to render any provision of the Federal Constitution otiose D or nugatory. The following cases on harmonious interpretation were referred to.

[203] In *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257; [2004] 2 AMR 317; [2004] 1 CLJ E 701 (FC) ('Kekatong') the Federal Court observed that one of the recognised canons of construction of a Constitution is that if two constructions are possible, then the court must adopt the one which will ensure the smooth and harmonious working of the Constitution and eschew the other which would lead to absurdity or give rise to practical inconvenience or make F well-established provisions of existing law nugatory.

[204] The Federal Court also enunciated that if the interpretation of the provisions of the Federal Constitution results in a conflict, then that conflict must be resolved. This is how the Federal Court put it: G

> [21] Having merely stated that the 'federal law' in art 121(1) refers to a valid federal law, no further step was taken by the Court of Appeal to delve into its significance. Instead, an extreme example was used to sideline what could otherwise have been programmed into a potent and powerful pointer towards the issues involved being H properly patterned. It is sufficient to say that the power of the court to declare a law void should be exercised only with reference to the specific legislation which is impugned (see *State of MP v GC Mandawar* 1955 SCR 599). This would exclude irrelevant and imaginary considerations. The simplistic approach of the Court of Appeal in dealing with the relationship between arts 8(1) and 121(1) overlooks the principle of considering the Constitution as a whole in determining the true I purport and import of a particular provision. A study of two or more provisions of a Constitution together in order to arrive at the true meaning of each one of them is an established rule of constitutional construction. In this regard, it is pertinent to refer to Bindra's *Interpretation of Statutes* (7th Ed) which says at pp 947–948:
>
> The Constitution must be considered as a whole, and so as to give effect, as far

as possible, to all its provisions. *It is an established canon of constitutional construction that no one provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose* of the instrument (*Old Wayne etc Association v McDonough SI L ed 345*; *Doconers v Bidwell 82 (US) 244:45 L ed 1088*; *Myers v United States 272 US 52:71 L ed 60, 180*).

An elementary rule of construction is, that *if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous* (*Williams v United States 289 US 553:77 L ed 1372; Marbury v Madison I Cranch (US) 137:2 L ed 60*; *Myers v United States 272 US 52:71 L ed 60*; *United States v Buffer 297 U SI: 80 L ed 477*).

[22] It follows that it would be *improper to interpret one provision of the Constitution in isolation from others* (see *S v Ntesang* (1995) 4 BCLR 426). It is a recognised canon of construction that *a court should proceed on the assumption that no conflict or repugnancy between different parts of the Constitution was intended by its framers* (see *Moinuddin v State of UP AIR 1960 ALL 484). In this regard, Raja Azlan Shah FJ (as His Highness then was) said in Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 at p 190:

This reasoning, in my view, is based on the premise that *the Constitution as the supreme law, unchangeable by ordinary means, is distinct from ordinary law and as such cannot be inconsistent with itself.*

[23] It was in that spirit that Suffian LP said in *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70 at p 72:

In our judgment, in construing art 4(1) and art 159, the rule of harmonious construction requires us to give effect to both provisions ...

[24] Thus, *if two provisions are in apparent conflict, a construction which will reconcile the conflict must be adopted*.

[205] Counsel for the plaintiffs also referred to the Privy Council's decision in *James v Commonwealth of Australia and State of New South Wales and Others (Interveners)* [1936] 2 All ER 1449 at p 1464, which utilised a generous interpretation to give individuals the full measure of fundamental rights and freedoms when it concerned a written Constitution:

It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning. It has been said that 'in interpreting a constituent or organic statute such as the Act [ie, the British North America Act], that construction most beneficial to the widest possible amplitude of its powers must be adopted': (*British Coal Corporation v R*, at

p 518.) But that principle may not be helpful, where the section is, as s 92 may seem to be, a constitutional guarantee of rights, analogous to the guarantee of religious freedom in s 116, or of equal right of all residents in all states in s 117. The true test must, as always, be the actual language used.

[206] Thus, consonant with the interpretation of the Federal Constitution, the plaintiffs contend that children born overseas to Malaysian mothers who are married to foreign husbands ought to be conferred citizenship by operation of law — and be placed in equal standing with children born overseas to foreign wives of Malaysian fathers. There should be no discrimination of citizens in like circumstances. Counsel for the plaintiffs submitted that a person's right to citizenship is a fundamental liberty that is intertwined with a person's right to liberty in art 5 of the Federal Constitution and right to equal protection under art 8 of the Federal Constitution. Any discrimination or derogation from these fundamental rights must be construed narrowly.

[207] In this regard, counsel referred to *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2010] 2 AMR 231; [2009] 5 CLJ 631 (FC) where the Federal Court speaking through Gopal Sri Ram FCJ compendiously discussed the approach to constitutional interpretation vis a vis fundamental rights. He said:

> [8] In the second place, the Constitution is a document *sui generis* governed by interpretive principles of its own. In the forefront of these is the principle that its provisions should be interpreted generously and liberally. On no account should a literal construction be placed on its language, particularly upon those provisions that guarantee to individuals the protection of fundamental rights. In our view, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II. Indeed the prismatic interpretation of the Constitution gives life to abstract concepts such as 'life' and 'personal liberty' in art 5(1). There are several authorities in support of this view. We will refer to some of them. And we begin at home with the case of *Dato Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, where Raja Azlan Shah Ag LP (as His Royal Highness then was) said:
>
> > In interpreting a Constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters or ordinary statutory interpretation. Secondly, a Constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v Fisher)* [1973] 3 All ER 21. A Constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A Constitution is a legal

instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law'. A

Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition and rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect of those fundamental rights and freedoms. The principle of interpreting Constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in *Attorney-General of St Christopher, Navis and Anguilla v Reynolds* [1979] 3 All ER 129 at p 136. B C

It is in the light of this kind of ambulatory approach that we must construe our Constitution.

[9] The next case is *Boyce v The Queen* [2004] UKPC 32, where Lord Hoffmann said: D

Parts of the Constitution, and in particular the fundamental rights provisions of chapter III, are expressed in general and abstract terms which invite the participation of the Judiciary in giving them sufficient flesh to answer concrete questions. The framers of the Constitution would have been aware that they were invoking concepts of liberty such as free speech, fair trials and freedom from cruel punishments which went back to the enlightenment and beyond. And they would have been aware that sometimes the practical expression of these concepts what limits on free speech are acceptable, what counts as a fair trial, what is a cruel punishment had been different in the past and might again be different in the future. But whether they entertained these thoughts or not, the terms in which these provisions of the Constitution are expressed necessarily co-opts future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights. E F

[10] The courts of Hong Kong have adopted a similar approach when interpreting their basic law. In *Leung Kwok Hung v The Hong Kong Special Administrative Region* [2005] 887 HKCU 1, Li CJ when delivering the unanimous judgment of the court of Final Appeal said: G

It is well established in our jurisprudence that the courts must give such a fundamental right a generous interpretation so as to give individuals its full measure. *Ng Ka Ling v Director of Immigration* [1999] 2 HKCFAR 4 at p 28–29. On the other hand, restrictions on such a fundamental right must be narrowly interpreted. *Gurung Kesh Bahadur v Director of Immigration* [2002] 5 HKCFAR 480 at para 24. Plainly, the burden is on the government to justify any restriction. H

This approach to constitutional review involving fundamental rights, which has been adopted by the court, is consistent with that followed in many jurisdictions. Needless to say, in a society governed by the rule of law, the courts must be vigilant in the protection of fundamental rights and must rigorously examine any restriction that may be placed on them. (Emphasis added.) I

[11] We return home to end our citation of the authorities. In the recent case of *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285, this court in the judgment of Hashim Yusoff FCJ approved, inter alia, the following passage in the judgment of the Court of Appeal in *Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213:

> The long and short of it is that our Constitution especially those articles in it that confer on our citizens the most cherished of human rights must on no account be given a literal meaning. It should not be read as a last will and testament. If we do that then that is what it will become.

More importantly, the majority of this court in *Badan Peguam Malaysia* also accepted the omnipresence of art 8(1) of the Constitution when interpreting its other provisions. And that brings us to the next principle of interpretation.

[12] The third principle is this. A court when interpreting the other provisions of our Constitution, in particular, those appearing in Part II thereof, must do so in the light of what has been correctly 'the humanising and all pervading provisions of art 8(1)' (see *Barat Estates Sdn Bhd & Anor v Parawakan a/l Subramaniam & Ors* [2000] 4 MLJ 107). That article reads: 'All persons are equal before the law and entitled to the equal protection of the law'. In *Badan Peguam Malaysia* this court in the majority judgment of Hashim Yusoff FCJ also accepted and applied the following statement of the Court of Appeal in *Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia*:

> When interpreting the other parts of the Constitution, the court must bear in mind all the providing provision of art 8(1). That article guarantees fairness of all forms of State action (see *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261).

The effect of art 8(1) is to ensure that legislative, administrative and judicial action is objectively fair. It also houses within it the doctrine of proportionality which is the test to be used when determining whether any form of state action (Executive, Legislative or Judicial) is arbitrary or excessive when it is asserted that a fundamental right is alleged to have been infringed (see *Om Kumar v Union of India* AIR 2000 SC 3689).

[13] The fourth principle of constitutional interpretation is this. Whilst fundamental rights guaranteed by Part II must be read generously and in a prismatic fashion, provisos that limit or derogate those rights must be read restrictively. As Lord Nicholls of Birkenhead and Lord Hope of Craighead in the Privy Council case of *Prince Pinder v The Queen* [2002] UKPC 46 said in their joint dissent:

> It should never be forgotten that courts are the guardians of constitutional rights. A vitally important function of court is to interpret constitutional provisions conferring rights with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford. Provision derogating from the scope of guaranteed rights are to be read restrictively. In the ordinary course they are to be given 'strict and narrow', rather than broad, constructions' (see *The State v Petrus* [1985] LRC (Const) 699) at p 720d-f, per Aguda JA in the Court of Appeal of Botswana, applied by Their Lordships' Board in *R v Hughess* [2002] 2 AC 259 at p 277 part 35.

This passage was quoted with approval by the majority of this court in the *Badan Peguam Malaysia* case. So much for the interpretive principles.

[208] Reference was also made to the Federal Court's minority decision in *CTEB*, where the learned Chief Justice opined that an individual's right to nationality is intertwined with his/her right to liberty in art 5 of the Federal Constitution and right to equal protection under art 8 Federal Constitution. The learned Chief Justice held that any derogation from these fundamental rights must be construed narrowly:

[82] Taking heed from *Lee Kwan Woh*, *as art 8(5) is a derogation from liberty, it must be construed narrowly.* Applying a narrow interpretation, the provision is clear as to the types of discrimination allowed under the FC and is, to that extent, exhaustive. *A perusal of it does not suggest that it allows discrimination in respect of the conferment of citizenship under any of the provisions of Part III, ie the provisions on citizenship.* In fact, as earlier observed, the FC guards against statelessness as seen in art 26B.

[209] Notwithstanding that the provisions pertaining to citizenship predate the insertion of the word 'gender' in art 8(2) of the Federal Constitution, the learned Chief Justice in *CTEB* held that the discriminatory effect submitted by the Government is unsustainable in light of the prohibition against discrimination on grounds of gender. The learned Chief Justice expressed her views in the following words:

[91] Further, *the discrimination between the father and mother as presented in the first example of discrimination [see para 86 herein] is expressly in violation of* art 8(2) *of the FC which provides that there shall be no prohibition against any citizen on grounds of gender in any law*. And as I have alluded to earlier, 'law' includes the FC. The word 'citizen' in this case refers to the father of the person through whom he seeks to base his claim to citizenship.

[92] I am mindful of the fact that the word 'gender' was only inserted into art 8(2) in the year 2001 vide constitutional (Amendment) (No 2) Act 2001 [Act A1130] and that the constitutional provisions in Parts II and III predate the said amendment to art 8.

Regardless*, it is a trite principle that Parliament is taken to know the law before it made such amendments* (see generally *Abdullah bin Atan v Public Prosecutor and other appeals* [2020] 6 MLJ 727; [2020] 9 CLJ 151). Parliament however made no attempt to amend the provisions on citizenship. In any event, *the FC is a living document and I believe my reading of* art 14*, s 1 of Part II to the Second Schedule and s 17 of Part III is correct. I am therefore of the view that the respondents' reading of s 17 of Part III as qualifying s 1(b) of Part II is unsustainable in light of this clear prohibition against discrimination on grounds of gender in any law as inserted into* art 8(2) *by Parliament in 2001*.

[210] Counsel also referred to the recent decision of the Federal Court in *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM,*

a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia [2022] 1 MLJ 71 (FC) ('CCH'). In *CCH* the issue was an abandoned child's entitlement to citizenship by operation of law pursuant to s 1(a) of Part II read together with s 19B of Part III of the Federal Constitution.

[211] In *CCH*, the learned Chief Justice made reference to the dissenting judgments in *CTEB* and also alluded to some of the pertinent interpretation principles concerning fundamental rights. The learned Chief Justice said relevantly:

> [43] Dato' Dr Cyrus Das referred us to the dissenting judgment of this court in *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 4 MLJ 236 ('CTEB') where it was stated that Part III which contains enabling provisions is meant to aid or assist in the interpretation of Parts I and II, and not to qualify or conditionalise the application of Parts I and II to Part III. The dissenting judgment had commented on s 19B of Part III, as follows:
>
> > [65] Both ss 19A and 19B of Part III are constitutional presumptions as to births. Section 19A codifies in part the international principle of flag state jurisdiction and applies in relation to persons who are born on a vessel such that their birth there is attributed to the place of registration of the vessel. *Section 19B applies in relation to children who are found abandoned in any given place such that the place of abandonment is treated as their place of birth and where their mother is also permanently resident there.*
> >
> > [66] All the above sections, namely ss 17, 19, 19A and 19B exist as supplementary or filler sections — so to speak — *to supplement or to close any gaps or to resolve technicalities that may arise when the person's parents' identity is in issue or even if their own place of birth is in issue so long as that is a relevant question for the purposes of Part I or Part II respectively*. (Emphasis added.)
>
> [44] The principles of *jus soli* and *jus sanguinis* as well as the principles on how the FC was drafted to enable citizenship as broadly as possible while weeding out statelessness have been discussed in great length by the minority of this court in *CTEB*. *We adopt the reasoning there as part of this judgment being the only other decision of the Federal Court apart from this one, to our knowledge, to have touched on this issue most recently.*
>
> [45] Before proceeding to examine s 19B with those principles in mind, we seek to remind ourselves of other important concepts on constitutional interpretation.
>
> [46] Citizenship no doubt is governed by Part III of the FC, but it is also a concept so inextricably linked to the right to life and personal liberty contained in art 5(1). As such, any provisions on it must be construed as widely as possible.
>
> [47] Having said that, we are completely mindful of the following warning by Abdoolcader J (as he then was) in *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356, at p 360:
>
> > I said in *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 ... that the Constitution is not to be construed in any narrow or pedantic sense

(*James v Commonwealth of Australia* [1936] AC 578) ... *but this does not mean that a court is at liberty to stretch or pervert the language of the Constitution in the interests of any legal or constitutional theory, or even, I would add, for the purpose of supplying omissions or of correcting supposed errors*. (Emphasis added.)

[48] The courts have always had to do battle with these two conflicting principles. On the one hand, it is said that the Judiciary cannot purport to usurp the role of the Legislature. On the other hand, it is said that the Judiciary must be proactive to protect fundamental rights. No matter the argument, we are constantly reminded of these fears and/or duties by both sides taking their respective positions in constitutional cases. Where do we draw the line between these two extremes?

[49] We believe that the answer to the question has been discussed an innumerable amount of times with the most recent being *CTEB*. The starting point is the understanding that fundamental rights and provisions must be construed as broadly as possible. Next, provisions which limit those rights must be construed as narrowly as possible. Finally, judicial precedent must play a lesser part when construing constitutional provisions. One cannot afford to be pedantic or cling helplessly to tabulated legalism.

[50] When construing a word or words in the FC protective of or guaranteeing a fundamental right, the court should give their widest possible meaning without changing or warping the 'base' meaning. And when construing interrelated provisions, the court should read them as a whole having regard to the purpose and intent of those provisions and harmonise their collective meaning rather than put them at odds with another.

[212] In *CCH*, the learned Chief Justice also said at para 72 that citizenship by operation of law is a right which was exalted to the status of a fundamental and constitutional right:

[72] In this regard and with respect, we are minded to observe that *citizenship by operation of law is a right — a fundamental and constitutional right*. It leaves absolutely no room for the exercise of subjective notions or presuppositions on what citizenship is. The words citizenship 'by operation of law' could not be any clearer, and there is no room whatsoever for discretion.

The FC reigns supreme at all times and the respondent and all related bodies are bound to comply with its dictates.

[213] As such, it was argued for the plaintiffs that, whilst art 8 is not absolute, any discrimination must be expressly provided for and cannot be by way of implication. In this case, the presence of the word 'father' in the citizenship provision cannot be implied that it was meant to discriminate against Malaysian mothers.

A THE GOVERNMENT'S ARGUMENT

[214] I turn now to the Government's case. The Government's case is that on a literal reading of art 14(1)(b) read together with s 1(b) of Part II of the Second Schedule, a child born overseas attains citizenship by operation of law if the father is a Malaysian citizen. The mother's citizenship is irrelevant. However, if a Malaysian woman is married to a foreigner and their child is born overseas, that child is not similarly entitled to Malaysian citizenship by operation of law.

[215] It was argued that acquisition of citizenship by operation of law under art 14(1)(b) of the Federal Constitution read together with s 1(b), Part II, Second Schedule of the Federal Constitution is anchored on the concept of *jus sanguinis*, ie right of blood, where the acquisition of citizenship is based on the citizenship of the child's father. Hence, children born overseas to a Malaysian father obtain citizenship through operation of law.

[216] The SFC's submissions can be summarised as follows:

(a) in construing the provisions of the Federal Constitution, the fundamental rule is to give effect to the intention of the framers of the Federal Constitution and such intention is gathered from the language of the provisions; and

(b) the court cannot insert new words into the Federal Constitution or rewrite the clear written text of the Federal Constitution.

[217] The SFC referred to the principles of constitutional interpretation that were discussed by the majority in *CTEB*, which read as follows:

> [160] The fundamental rule in interpreting the FC or any written law is to give effect to the intention of the framers. The court cannot insert or interpret new words into the FC. The court may only call in aid of other canons of construction where the provisions are imprecise, protean, evocative or can reasonably bear more than one meaning. I find s 17 is plain and clear in its meaning. The court should not endeavour to achieve any fanciful meaning against the clear letters of the law.
>
> ...
>
> [201] What happens to the much-lauded doctrine of separation of powers and the judicial oath of upholding the Constitution. Is it not the doctrine of separation of powers which forms the basis of our democratic nation that deserves our attention and respect. We all know that there is no judicial supremacy articulated in our FC, and the power to amend the Constitution rests solely with the Parliament by virtue of art 159. The court cannot at its own fancy attempt to rewrite the clear written text of the FC because it would only lead to absurdity.

[218] It was argued on behalf of the Government that the word 'father' in s 1(b), Part II, Second Schedule of the Federal Constitution should not be

interpreted to mean either parent, that is, father or mother. The SFC submitted that the plaintiffs' contention that the word 'father' should be construed to mean either parent (that is, father or mother) is untenable for the following reasons:

(a) if the framers of the Federal Constitution had intended to refer to either parent in s 1(b), Part II, Second Schedule of the Federal Constitution, they would have use the words 'whose parents one at least' as used in *s 1(a) and s 1(d), Part II, Second Schedule of the Federal Constitution* which read as follows:

> (a) every person born within the Federation of whose parents one at least is at the time of the birth either a citizen or permanently resident in the Federation; and
>
> ...
>
> (d) every person born in Singapore of whose parents one at least is at the time of the birth a citizen and who is not born a citizen otherwise than by virtue of this para; and.

(b) if the framers of the Federal Constitution had intended the word 'father' to mean either parent, the framers would not have used the words 'whose parents one at least' in s 1(a) and s 1(d), Part II, Second Schedule of the Federal Constitution; and

(c) the usage of the word 'father' in s 1(b) and the usage of the words 'whose parents one at least' in s 1(a) and s 1(d) clearly show that the word 'father' specifically refers only to male parent and should not be interpreted to mean either parent.

[219] The Government's position is that the word 'father' in s 1(b), Part II, Second Schedule of the Federal Constitution should not be construed as either parent. Essentially the word 'father' should not be construed as 'mother'. In response to the plaintiffs' contention that reference may be made to s 2(94) of the Eleventh Schedule of the Federal Constitution, which provides that words importing the masculine gender include females, and therefore, the word 'father' includes 'mother', it was submitted on behalf of the Government as follows:

(a) words importing the masculine gender are words such as 'he', 'him' and 'his'; which can be seen throughout the Federal Constitution. Following the Eleventh Schedule of the Federal Constitution, such words can be construed as 'she', 'her' and 'hers' respectively;

(b) the word 'father' is not a mere word importing the masculine gender. The word 'father' is a specific word referring to a male parent;

(c) if such a construction is applicable to the word 'father', ie that it includes 'mother', then the framers of the Federal Constitution would not have use the words 'whose parents one at least' in s 1(a) and s 1(d), Part II, Second Schedule of the Federal Constitution. The usage of the words 'whose parents one at least' would be superfluous; and

(d) as such, the construction as provided in the Eleventh Schedule of the Federal Constitution is clearly not applicable to the word 'father' in s 1(b), Part II, Second Schedule of the Federal Constitution.

[220] Further, it was contended that the interpretation of the citizenship provisions in the Federal Constitution are specifically provided in Part III, Second Schedule, particularly ss 17 to 22. The application of Part III, Second Schedule of the Federal Constitution to the citizenship provisions is expressly provided by art 31 of the Federal Constitution as follows:

> *31 Application of Second Schedule*
>
> Until Parliament otherwise provides, the supplementary provisions contained in Part III of the Second Schedule shall have effect for the purposes of this Part.

[221] Thus, based on the interpretation provisions in Part III, Second Schedule of the Federal Constitution, particularly ss 17 to 22, the only situation where the word 'father' should be interpreted to mean 'mother' is in the case of an illegitimate child. This is provided by s 17, Part III, Second Schedule of the Federal Constitution, which reads as follows:

> 17. For the purposes of Part III of this Constitution references to a person's father or to his parent, or to one of his parents, are in relation to a person who is illegitimate to be construed as references to his mother, and accordingly s 19 of this Schedule shall not apply to such a person.

[222] The SFC said that the wording of s 1(b), Part II, Second Schedule of the Federal Constitution is very plain and clear in that it specifically uses the word 'father', not 'whose parents one at least' and not 'mother'. As such, the word 'father' should be given its plain and literal meaning.

[223] According to the SFC, other canons of construction should not be employed in interpreting the plain and clear provisions of the Federal Constitution, including alleged inconsistency with art 8 as contended by the plaintiffs. To support this, the SFC referred to the (majority) decision of the Federal Court in *CTEB* which, reads as follows:

> [160] The fundamental rule in interpreting the FC or any written law is to give effect to the intention of the framers. The court cannot insert or interpret new words into the FC. The court may only call in aid of other canons of construction where the provisions are imprecise, protean, evocative or can reasonably bear more

than one meaning. I find s 17 is plain and clear in its meaning. The court should not endeavour to achieve any fanciful meaning against the clear letters of the law.

[224] Next the SFC said that there is no necessity to construe or to interpret art 14(1)(b) read together with s 1(b), Part II, Second Schedule of the FC in a manner that is consistent with art 8 of the Federal Constitution because:

(a) both art 14(1)(b) of the Federal Constitution read together with s 1(b), Part II, Second Schedule of the Federal Constitution and art 8 of the Federal Constitution are provisions of the Federal Constitution, the supreme law itself;

(b) all provisions of the Federal Constitution are of equal standing as between themselves and are not subordinate to each other; and

(c) the Federal Constitution cannot be said to be at variance with itself and a provision of the Federal Constitution can never be said to be inconsistent with another provision of the Federal Constitution (see *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (FC)).

[225] The learned SFC placed much reliance on the majority decision of the Federal Court in *CTEB* where the issue of discrimination vis a vis art 14 of the Federal Constitution was concerned. The passages from the majority judgment of the Federal Court in *CTEB* which discussed the issue of discrimination are as follow:

Discriminatory issue

[83] Learned counsel in his submission also addressed us on potential discriminatory implications of art 14 reading it as it is. To recap this point, in his submissions learned counsel argued that it would be a discriminatory reading of the FC if the construction of the provisions leads to discrimination between a legitimate and an illegitimate child. It is also discriminatory between a father and a mother when s 17 is applied. The protection against discrimination is part of the constitutional guarantee embedded in art 8 of the FC.

...

[85] A student of constitutional law will appreciate that not all forms of discrimination are protected by art 8. Article 8 opens with 'Except as expressly authorised by this Constitution ...'. In short, discrimination authorised by the FC is not a form of discrimination that art 8 seeks to protect. *There are in fact a number of discriminatory provisions expressed in the FC which include* art 14. *Since the discriminatory effect of* art 14 *is one authorised by the FC, it would be absurd and clearly lack of understanding of art 8 for any attempt to apply the doctrine of reasonable classification, to* art 14.

[86] Many views have also been expressed on the gender biasness of the provisions in relation to laws on citizenship. Learned author Emeritus Professor Datuk Dr Shad Saleem Faruqi at p 180 in his book Our Constitution in relation to the issue on citizenship observes that, 'the Malaysian law on citizenship is riddled with sex

bias'. He concluded on this issue by posing a question on how far these aspects of law will be modified to accommodate gender equality remains to be seen. The same gender bias issue has also been expressed by another academician Dr Low Choo Chin under Chapter 3 in the book *International Marriages and Marital citizenship Southwest Asian Woman on the Move* (1st Ed, Routledge 2017) at p 66.

...

[88] This whole issue begs the question of *whether the Judiciary in the exercise of its judicial duty is constitutionally empowered to ignore or neglect the clear dictates of the FC and overcome that authorised gender bias in the name of progressive construction of the FC*. Since the FC discriminates between a legitimate and an illegitimate child, a father and a mother of an illegitimate child, *can the court alter that discrimination so as to keep the FC living dynamically in order to avoid it from being locked and fossilised in 1963*.

[89] What happens to the much-lauded doctrine of separation of powers and the judicial oath of upholding the Constitution. Is it not the doctrine of separation of powers which forms the basis of our democratic nation that deserves our attention and respect. We all know that there is no judicial supremacy articulated in our FC, and the power to amend the Constitution rests solely with the Parliament by virtue of art 159. The court cannot at its own fancy attempt to rewrite the clear written text of the FC because it would only lead to absurdity.

[226] The SFC's submissions on the legislative intention in inserting the word 'gender' in art 8(2) of the Federal Constitution vis a vis citizenship provisions and the applicability of provisions relating to citizenship in CEDAW and CRC were as follows.

[227] According to the SFC, in amending art 8(2) of the Federal Constitution to insert the word 'gender', the Legislature had intended that the amendment would not apply to the citizenship provisions in the Federal Constitution. The word 'gender' was inserted in art 8(2) via s 3 of the Constitution (Amendment) (No 2) Act 2001 (Act A1130). When the Constitution (Amendment) (No 2) Bill 2001 was debated in the Dewan Rakyat on 31 July 2001 and 1 August 2001, the issue of the amendment to art 8(2) of the Federal Constitution vis a vis arts 14 and 15 of the Federal Constitution was raised and addressed as follows:

Puan Fong Po Kuan: ... Jadi saya berharap Yang Berhormat Bagan Datok juga akan seterusnya menyokong dan juga mencadangkan pemindaan yang lain-lain seperti Akta Imigresen dan juga ke atas Perkara 14 dan 15 di dalam Perlembagaan Persekutuan yang juga mendiskriminasikan wanita yang pemindaan ke atas Perkara 8 hanya satu perkara am sahaja — general clause sahaja, dengan izin — Tuan Yang di-Pertua.

[See: Hansard dated 31 July 2001]

Puan Chong Eng: Terima kasih Yang Berhormat Menteri. Saya ingin mendapat penjelasan mengapa Perkara 8 tidak dipinda bersama-sama dengan Perkara 14 dan Perkara 15 dalam Perlembagaan kerana ini adalah berkaitan. Dan Perkara 14 dan

Perkara 15 juga mendiskriminasikan wanita atas jantinanya. Kalau berbanding dengan Perkara 56, 57 dan 65 bahawa perkara-perkara yang berkaitan telah dipinda sekali gus tetapi di dalam Perkara 8(2) mengapa? Bolehkan Yang Berhormat Menteri menjelaskan ...

Datuk Seri Utama Dr. Rais bin Yatim: Ada pepatah berkata Tuan Yang di-Pertua, 'Fikiran tidak datang sekali, pandangan tidak sesaujana', oleh itu yang difikirkan penting dahulu ialah Perkara 8 oleh kerana Perkara 8 mengandungi asas kepada kesamarataan sedangkan Perkara 14, 15 mengenai warganegara. Hal warganegara amat rumit dan pada masa ini tidak perlu kita sentuh dahulu oleh kerana peruntukan-peruntukan khusus di bawah Undang-undang Kewarganegaraan perlu mendapat satu penelitian yang lebih khusus sedangkan di bawah Perkara 8(2) kita hanya perlu memberi taraf sama rata kepada wanita.

[See: Hansard dated 1 August 2001]

[228] The SFC submitted that based on the excerpts of Hansard, it is clear that the legislative intention is that the insertion of the word 'gender' in art 8(2) of the Federal Constitution (which is a general provision on equality) would not affect arts 14 and 15 of the Federal Constitution (which are specific provisions on citizenship). Therefore, it was submitted that the Legislature in amending art 8(2) of the Federal Constitution to insert the word 'gender' had intended that the amendment would not apply to the citizenship provisions in the Federal Constitution.

[229] And in so far as CEDAW and CRC are concerned, the SFC made the following points. The SFC referred to the following provisions in CEDAW and CRC relating to citizenship namely:

(a) *article 9 of CEDAW*

1. State Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. *States Parties shall grant women equal rights with men with respect to the nationality of their children.*

(b) *article 7 of CRC*

1. The child shall be registered immediately after birth and shall have the right from birth to a name, *the right to acquire a nationality* and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

[230] There is no dispute that Malaysia acceded to both CEDAW and CRC in 1995. However, Malaysia's accession to CEDAW and CRC is subject to reservations in respect of the provisions relating to citizenship as mentioned above. This can be seen as follows:

(a) Reservations in CEDAW

The Government of Malaysia declares that Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia' law and the Federal Constitution of Malaysia. With regard thereto, further, the Government of Malaysia does not consider itself bound by the provisions of Articles 2(f), 5(a), 7(b), 9 and 16 of the aforesaid Convention.

[See: Depositary Notification C.N.250.1995]

The Government of Malaysia withdraws its reservation in respect of article 2(f), 9(1), 16(b), 16(d), 16(e) and 16(h).

With respect to article 9, para 2 of the Convention, the Government of Malaysia declares that its reservation will be reviewed if the Government amends the relevant law.

[See: Depositary Notification C.N.82.1998]

The Government of Malaysia declares that Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia' law and the Federal Constitution of Malaysia. With regard thereto, further, the Government of Malaysia does not consider itself bound by the provisions of articles 9 (2), 16 (1) (a), 16 (1) (c), 16 (1) (f) and 16 (1) (g) of the aforesaid Convention.

[See: Depositary Notification C.N.472.2010]

(b) Reservations in CRC

The Government of Malaysia accepts the provisions of the Convention on the Rights of the Child but expresses reservations with respect to articles 1, 2, 7, 13, 14, 15, 22, 28, 37, 40 paras. 3 and 4, 44 and 45 of the Convention and declares that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.

[See: Depositary Notification C.N.58.1995]

1. The Government of Malaysia withdraws its reservation on Articles 22, 28 para 1 (b), (c), (d), (e) and paras 2 and 3, Article 40 para 3 and 4, Articles 44 and 45.

2. The Government wishes to reiterate its reservation on Articles 1, 2, 7, 13, 14, 15, Article 28 para 1 (a) and Article 37.

[See: Depositary Notification C.N.282.1999]

The Government of Malaysia accepts the provisions of the Convention on the Rights of the Child but expresses reservations with respect to articles 2, 7, 14, 28

para 1 (a) and 37 of the Convention and declares that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.

[See: Depositary Notification C.N.473.2010]

[231] Based on the foregoing, the SFC submitted that, although Malaysia acceded to CEDAW and CRC, Malaysia had made express reservations in respect of provisions relating to citizenship in both CEDAW and CRC. Therefore, the articles relating to citizenship in CEDAW and CRC are not applicable and cannot override the express citizenship provisions in the Federal Constitution.

[232] In conclusion, it was submitted on behalf of the Government that:

(a) the Legislature in amending art 8(2) of the Federal Constitution to insert the word 'gender' had intended that the amendment would not apply to the citizenship provisions in the Federal Constitution; and

(b) the provisions relating to citizenship in CEDAW and CRC are not applicable and cannot override the express citizenship provisions in the Federal Constitution.

ANALYSIS AND DECISION

[233] The primary question is whether there is a conflict between art 8(2) of the Federal Constitution and art 14(1)(b) read with s (1)(b) Part II of the Second Schedule of the Federal Constitution. In my view there is plainly and patently a conflict as the wording of the latter gives rise to the interpretation that the bloodline of the Malaysian mother is to be treated as inferior to that of the father as the *jus sanguinis* principle does not apply in order for the mother to pass her Malaysian citizenship to her child because she is married to a non-citizen and her child of that lawful union was born outside the Federation of Malaysia.

[234] In this regard, it is important to bear in mind that the Federal Court in *Kekatong* had posited that any conflict between the provisions of the Federal Constitution must be resolved by the courts by utilising the time-honoured tools of constitutional interpretation so as to achieve a harmonious interpretation of the conflicting provisions.

[235] To put it very bluntly, the conflict stems from the conundrum where, for citizenship purposes under the *jus sanguinis* principle, the bloodline of the Malaysian mother is to be treated as inferior to that of the father.

[236] In such a situation, it would not be unfair to say that it is illogical, perverse and degrading to the rights, aspirations, expectations and dignity of Malaysian mothers that the father's bloodline, regardless of who he married and where his child is born, could be reckoned for citizenship by operation of law, but not that of the Malaysian mother. In short, it is blatantly discriminatory of the rights of the Malaysian mother who is married to a foreigner and whose child is born overseas. Any which way one looks at it, the conclusion that this is discriminatory of the rights of the Malaysian mother is plainly inescapable.

[237] The Government relies on the gender discriminatory wording of art 14(1)(b) read with s (1)(b) Part II of the Second Schedule of the Federal Constitution to legitimise the discrimination against a Malaysian citizen despite the clear and unambiguous wording of art 8(2) of the Federal Constitution that there shall be no gender discrimination in any laws against Malaysian citizens. There is no dispute that 'law' (per art 160) includes the Federal Constitution.

[238] It is beyond doubt that art 8(2) was enacted to protect all Malaysian citizen by forbidding gender discrimination in ordinary laws and by extension, the Federal Constitution as well. Thus, the question is whether the gender discriminatory wording of art 14(1)(b) read with s (1)(b) Part II of the Second Schedule of the Federal Constitution, as presently worded, *sans* the *non-obstante* clause and without 'matters relating to citizenship' being included as an item under art 8(5), is contrary to art 8(2).

[239] And if it is discriminatory, whether it must accordingly be read in a non-discriminatory way so that the word 'father' appearing in s (1)(b) Part II of the Second Schedule of the Federal Constitution includes 'mother'.

GENDER DISCRIMINATION POST-28 SEPTEMBER 2001

[240] A related question is whether, after 28 September 2001, the discriminatory wording of s 1(b), Part II of the Second Schedule of the Federal Constitution, which recognises only the blood descent of the father, and not that of the mother, may continue to be read in that fashion after the amendment of art 8(2). This invariably takes us to the topic of CEDAW. It is not in dispute that under CEDAW, a woman is not to be treated as subordinate to a man or relegated in legal standing to a status inferior to that of a man. Article 9(2) CEDAW, expressly provides that 'the State shall grant women equal rights with men with respect to the nationality of their children'. And under art 7 CRC, a child shall have 'the right to acquire nationality'.

[241] It is common ground that art 8(2) of the Federal Constitution which was amended with effect from 28 September 2001, abolished any form of

gender discrimination against Malaysian citizens in all Malaysian laws. The 2001 amendment to art 8(2) was to ensure that Malaysia complies with its obligations under CEDAW. Thus, art 8(2) was amended to expressly bring the Constitution up to date to forbid gender discrimination. The Honourable Minister's statement makes this point very clear in his speech to Parliament. The Honourable Minister said:

> Kerajaan berpendapat *sudah sampailah masanya kedudukan seimbang warganegara wanita dengan warganegara lelaki dinegara ini dicerminkan dan dikukuhkan dengan meminda Fasal 2, Perkara 8 Perlembagaan Persekutuan untuk melarang diskriminasi atas alasan jantina*. (Emphasis added.)

[242] Article 8(2) of the Federal Constitution is undoubtedly a protection or safeguard accorded to 'citizens' only as opposed to art 8(1) Federal Constitution which applies to 'all persons'. Obviously, art 8(1) is an omnibus provision and has a broader application whilst art 8(2) is a constitutional protection against, inter alia, gender discrimination but specifically for protection of *Malaysian citizens only*. As rightly submitted by counsel for the plaintiffs, art 8(2) of the Federal Constitution is a protection afforded only to Malaysian citizens and it is a 'no discrimination' safeguard to be enjoyed by all Malaysian citizens under any law in Malaysia. Here it should be noted that the Malaysian mothers are citizens. As such, they are entitled to the full protection and rights accorded under art 8(2) of the Federal Constitution.

FACTS DIFFERENT FROM *CTEB/CCH*

[243] It is important to reiterate that these appeals are not in regard to claims to citizenship for children born out of wedlock regardless of whether they were born within or outside the Federation of Malaysia, and they are also not in regard to claims in respect of abandoned children. In Appeal 531, the claims are by Malaysian mothers on behalf of their children born overseas and in Appeal 273 the claim is by a person born overseas to a Malaysian mother. These are fundamental distinctions which differentiate the appeals from the fact pattern in *CTEB* and *CCH*. In *CTEB*, the child was born outside the Federation of Malaysia and was illegitimate at the time of his birth. The child's father was a Malaysian whilst his mother was a non-citizen. Thus, in *CTEB* the mother of the child was not a Malaysian citizen, which makes the present appeals different from the fact pattern in *CTEB.* In *CCH*, the claim was made on behalf of a child who was regarded by the Federal Court as 'abandoned'.

WHAT DID PARLIAMENT INTEND BY AMENDING ART 8(2)?

[244] I turn next to the 2001 amendment. It is trite that Parliament is presumed to know of all existing laws when it legislates. Parliament does not legislate in vain. Thus, when Parliament amended art 8(2) with effect from 28

A September 2001 and thereby expressly declared that there should be no gender discrimination 'in any law', Parliament is deemed to have intended it to apply to all discriminatory provisions found within the Federal Constitution itself, unless the discriminatory provisions are legitimised via art 8(5) or via a *non-obstante* clause.

B

[245] In this regard, Parliament is deemed to be aware of the gender-discriminatory wording of art 14(1)(b) read with s (1)(b), Part II of the Second Schedule of the Federal Constitution.

C

[246] However, Parliament did not amend art 8(5) to include 'matters concerning citizenship' so as to exclude it from the influence of art 8(2). Further, Parliament did not amend art 14(1)(b) to add a *non-obstante* clause so as to insulate it from the all-pervading influence of art 8(2).

D

[247] I accept that art 8(2) does in fact recognise that there are certain discriminatory provisions within the Federal Constitution which are valid. But it is relevant to note that these are discriminatory provisions which expressly state that they are discriminatory notwithstanding art 8. For example, E arts 153(2), (8) and (8A) of the Federal Constitution safeguard the 'special position of the Malays and natives of Sabah and Sarawak' and confer special privileges on them in the areas mentioned therein.

[248] And art 8 is *excluded* by the opening words 'notwithstanding anything F in this Constitution' which is expressly stated in all those articles. Another provision is art 161A(5) of the Federal Constitution relating to the special position of the native peoples of Sabah and Sarawak in relation to their land rights. Article 161A(5) specifically excludes art 8 by declaring that 'Article 8 shall not invalidate or prohibit any provision of State law ... for natives of the G State ... giving them preferential treatment as regards the alienation of land'. Thus, whilst these articles are discriminatory, they do not fall foul of art 8(2) as they are preceded by *non-obstante* clause, which is glaringly missing in art 14(1)(b) of the Federal Constitution.

H **[249]** I agree with the plaintiff's submission that the omission to amend art 14(1)(b) to insert a *non-obstante* clause, or the omission to add 'matters concerning citizenship' under art 8(5), is a rebuttal to the Government's argument on the CEDAW reservations. As rightly highlighted by counsel, the CEDAW reservations are essentially the product of political decisions of the I Government of the day and are not binding on the courts. I am of the view that, consistent with the CEDAW reservations, the Government should have legitimised the gender discrimination in art 14(1)(b) read with s (1)(a) Part II of the Second Schedule by amending art 8(5) or adding a *non-obstante* clause in art 14(1)(b). But this was not done. Instead, the Government relies on the

general exclusion contained in the opening words of art 8(2), 'except as expressly authorised by this Constitution ...'.

[250] It is important and imperative to state here that art 8, like art 5, is one of the constituent pillars of fundamental rights under Part II of the Federal Constitution and has an *all-pervading* influence on the interpretation of the rest of the Federal Constitution. Support for this proposition may be found in the decision of the Federal Court in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 3 AMR 101; [2019] AMEJ 0208; [2019] 3 MLRA 1; [2019] 5 CLJ 780 (FC) which said at para 117 'When interpreting other provisions in the FC the courts must do so *in light of the humanising and all-pervading provision of* art 8(1)'. (Emphasis added.)

[251] Of course, the all-pervading influence or effect could have been lawfully emasculated, restricted or qualified by employing a *non-obstante* clause in art 14(1)(b). But that was not done. Had the Government amended art 14(1)(b) to insert a *non-obstante* clause then that would have insulated art 14(1)(b) from the all-pervading influence of art 8(2) of the Federal Constitution. The other route would have been to amend art 8(5) to add a sub-para to include 'matters concerning citizenship'. And, if 'citizenship' had been included in art 8(5) or if the *non-obstante* clause had been inserted, then that would have been the end of the matter and there would be no room to argue that art 14(1)(b) is subject to the influence of art 8(2).

READING 'MOTHER' INTO THE WORD 'FATHER'

[252] In the result, I am impelled to the view that the word 'father' in s 1(b), Part II of the Second Schedule should be read in a non-discriminatory way as to be aligned with art 8(2) to include 'mother'. This is because, by virtue of art 8(2), it will be unconstitutional to practice gender discrimination by recognising the blood descent of the father but not that of the mother for purposes of according citizenship (by operation of law) to a child born overseas.

[253] No doubt, if the word 'father' in s 1(b), Part II, Second Schedule is interpreted to include 'mother', then it will not sit well with s (1)(a) and (d) of Part II, Second Schedule, which uses the words, 'whose parents one at least'. But I see this as a self-induced situation, in that the Government has brought this upon themselves.

[254] In my view, if the Government had properly legitimised the gender discrimination in the manner as alluded to earlier via amendment to art 8(5) or by adding a *non-obstante* clause to art 14(1)(b),then that would have resolved the conundrum arising out of the 2001 amendment to art 8(2) vis a vis Malaysian mothers who are married to foreigners and whose children are born

outside the Federation of Malaysia. The Government may not now benefit from their omission to insulate the gender discrimination by pointing to the fact that if the word 'father' is interpreted as including 'mother', it will not sit comfortably with the other sub-sections, namely s (1)(a) and (d) of Part II of the Second Schedule where the words, 'whose parents one at least' are used.

READING THE FEDERAL CONSTITUTION IN AN INTRA VIRES WAY

[255] In the circumstances, and having due regard to the 2001 Amendment, it is appropriate, necessary and imperative to utilise the organic method of constitutional interpretation to resolve the legislative conundrum as discussed earlier. Thus, following the Federal Court's decision in *Nizar v Zambry*, the Federal Constitution is to be treated as a 'living instrument' and is to be interpreted in such a manner as is suitable for the present time. The effect of employing the organic method of constitutional interpretation is that the court is called upon to give recognition to current constitutional changes (the 2001 Amendment) and not to interpret constitutional provisions as if they stand fossilised as at August 1957.

[256] The purpose of employing the organic method of constitutional interpretation is to ensure that the constitutional provision is read in an intra vires way and to avoid any conflict with the other provisions of the Federal Constitution, particularly, Part II containing the fundamental liberties provisions. Counsel for the plaintiffs said that it is a reading method that is designed to avoid the absurdity where the citizenship provisions of the Federal Constitution may be applied in a discriminatory way in spite of the amendment of art 8(2). He also said that it is to avoid the absurdity of keeping the rights of persons and citizens outside the reach of Part II of the Federal Constitution on fundamental rights containing arts 5 and 8. I agree with these submissions.

AVOIDING ABSURDITY

[257] In my view, it is not heretical for the court to read constitutional provisions with modification to avoid absurdity resulting from their literal application. The approach to statutory or constitutional interpretation may be seen from the decision of the Court of Appeal in *Kwan Ngen Wah & Anor v Julita bt Tinggal* [2022] 4 MLJ 287 (CA), where a statutory provision was read with modification because it would otherwise result in the absurdity of two lay persons who sit with a High Court judge being able to outvote him on a pure question of law.

[258] In that case, to overcome the absurdity of the native chiefs overruling

the High Court judge on a pure question of law, the Court of Appeal invoked the technique of reading in words of limitation to fulfil the legislative objective in placing a High Court judge to preside in the native appeal court. The Court of Appeal relied on the Federal Court decision in *Tan Kim Hock Product Centre Sdn Bhd & Anor v Tan Kim Hock Tong Seng Food Industry Sdn Bhd* [2018] 2 MLJ 1; [2018] 2 CLJ 567; [2018] 1 MLRA 631; [2018] 1 AMR 621 (FC) for this proposition.

[259] I am of the view that that the organic theory of constitutional interpretation applies in the present case to prevent the absurdity of the citizenship provisions of the Federal Constitution being applied in a discriminatory way. It is not just necessary but also urgent and imperative that Part II (Fundamental Liberties) and Part III (citizenship) of the Federal Constitution be read harmoniously to ensure there is no discrimination between a mother and father in their capacity to pass on their citizenship status to their children.

[260] It is also my view that in interpreting art 14(1)(b) read with s 1(b), Part II, Second Schedule in the manner as alluded to above, ie 'father' to be read as including 'mother', the court is neither amending nor rewriting the Federal Constitution. In this regard, it may be recalled that in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545; [2018] 2 AMR 313; [2018] 3 CLJ 145 (FC), the Federal Court invoked the interpretative provisions of the Eleventh Schedule and re-interpreted the word 'parent' in art 12(4) of the Federal Constitution as including the plural 'parents'.

[261] The outcome of the decision in *Indira Gandhi*'s case was not an amendment or re-writing of art 12(4) but a curial statement of its proper interpretation by reliance on the other parts of the Federal Constitution which influenced its proper reading. Ultimately, it is the harmonious rule of construction which applies and every part of the Constitution must be read in harmony with the rest.

THE CONSTITUTIONAL STATUS OF CITIZENSHIP RIGHTS

[262] It is also important to point out that in *CCH* the Federal Court, albeit that it dealt with a claim for citizenship by operation of law for an abandoned child, stated at para 46 that citizenship provisions 'must be construed as widely as possible' because they are 'inextricably linked' to the right life and liberty contained in art 5(1).

[263] Article 8 is necessarily a sister provision of art 5 and they are often applied together in construing the rights of individuals. And in para 72 of

CCH, the Federal Court held that citizenship by operation of law is 'a fundamental and constitutional right' leaving 'no room for the exercise of subjective notions or pre-suppositions on what citizenship is ... there is no room whatsoever for discretion'. These are in my view profoundly important pronouncements by the Federal Court touching upon the issue of citizenship by operation of law which are wholly applicable to the issue at hand.

[264] It is my view that in interpreting art 14(1)(b) read together with s 1(b) of Part II of the Second Schedule, the interpretation provisions applicable to the Federal Constitution per s 2(94) of the Eleventh Schedule of the Federal Constitution, which provides for the construction of words importing the masculine gender to include females, may be relied upon so that the word 'father' which appears in para 1(b) of Part II of the Second Schedule of the Federal Constitution is to be interpreted as including the word 'mother', with the result that children born overseas to the Malaysian mothers whose husbands are foreigners are conferred Malaysian citizenship by operation of law.

[265] Indeed, I find nothing in the language of art 31 or any other provision of the Federal Constitution which precludes reference being made to s 2(94) Eleventh Schedule to resolve the gender issue.

[266] This is particularly important when seen in light of the 2001 Amendment to art 8(2), which necessarily influences art 14(1)(b) read with s 1(b), Part II of the Second Schedule. Learned SFC said that 'masculine gender' cannot be read as including a specific word such as father, which denotes 'male parent'. With respect, I disagree with this part of the learned SFC's submission. Whilst the word 'father' is a specific word and refers to the 'male parent', it does not mean that 'father' does not fall within the phrase 'masculine gender'. In my view, the SFC's own understanding of what is meant by the 'masculine gender' can hardly be the touchstone for the definition of that phrase. In my view, the phrase masculine gender must be read liberally and though it can include words such as 'he', 'him' and 'his', it cannot be read as excluding associated words such as 'father', 'brother', 'uncle' etc I therefore reject the learned SFC's utterly narrow interpretation of s 2(94) of the Eleventh Schedule when he says that the 'masculine gender' does not include a specific word such as 'father'.

METHOD OF CONSTITUTIONAL INTERPRETATION OF FUNDAMENTAL RIGHTS

[267] It is I think relevant to remind ourselves that constitutional interpretation is a curial interpretative exercise of the supreme legislation of the Federation of Malaysia which is *sui generis*. It has no comparison. It is unlike ordinary legislation. The Federal Court in *Nizar v Zambry* whilst endorsing the

organic method of constitutional interpretation gave the following guidance on the approach to be employed. The following lucid extracts from the judgment in *Nizar v Zambry* are illuminating on the point under discussion:

> ... Fundamental rights provisions 'call for a *generous interpretation avoiding the austerity of tabulated legalism, suitable to give to individuals the full measure of the fundamental rights and freedom*.
>
> ...
>
> A Constitution should be construed with less rigidity and more generosity than other statutes and as *sui juris, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which has been used*.
>
> ...
>
> The only true guide and the only course which can produce stability in constitutional law is to *read the language of the Constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning*.
>
> The *organic method requires us to see the present social conditions and interpret the Constitution in a manner so as to resolve the present difficulties*. From the authorities cited above *our courts are inclined to the organic theory in the interpretation of the Constitution*.
>
> One other important guide in interpretation of Constitution is that, *'The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions*. It is an established canon of constitutional construction that *no one provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument*'.

[268] In so far as the Minister's response to the questions that were posed during the debate in Parliament when the 2001 Amendment Bill was being introduced, I do not see how they assist the Government's position in relation to the question and the issues which have arisen for consideration in these appeals. Whilst the Minister did agree that gender discrimination would continue despite the 2001 amendment, his answers in regard to the discrimination issue vis a vis citizenship were, at best, equivocal. The Minister did not unequivocally say that it was Parliament's intention that it is 'business as usual' and that gender discrimination via art 14(1)(b) read with s 1(b), Part II, Second Schedule of the Federal Constitution should continue despite the amendment to art 8(2), which prohibits gender discrimination in any of the laws of Malaysia.

[269] All that the Minister said was that citizenship was a complex issue. That answer is neither here nor there. In any event, the Minister's answer in Parliament does not tie or bind the court's hands. At the end of the day, the outcome of the interpretative dispute is a matter for the court to decide upon

a proper evaluation of the facts and the requisite provisions of the Federal Constitution and upon application of the established principles of constitutional interpretation.

[270] I come back to the point made earlier, that the Government could have very easily inserted a *non-obstante* clause in art 14(1)(b) of the Federal Constitution read together with s 1(b), Part II to state 'Notwithstanding art 8(2)' ... or words to that effect, so that it is made expressly clear and unequivocal that Parliament has intended that art 8(2) of the Federal Constitution is not to regulate or control art 14(1)(b) of the Federal Constitution read together with s 1(b), Part II of the Second Schedule. Alternatively, art 8(5) could have been amended to include a sub-para to exclude 'matters concerning citizenship' from the ambit of art 8(2). The Government ought to have been aware that there are provisions in the Federal Constitution where the *non-obstante* clause is present, which insulates those provisions from the all-pervading effect of art 8(2). Thus, if it was intended that after 28 September 2001, gender discrimination should continue then the Government should have made the necessary amendments as discussed above.

[271] Further, it is my view that, as part of the interpretative exercise, it is not just permissible, but also necessary for the court to refer to art 160(1) and s 2(94) of the Eleventh Schedule, which deals with the construction of the phrase 'masculine gender'. Section 2(94) states that *words importing the 'masculine gender' include 'females'*.

[272] In my view, the word 'father' in s 1(b) of the Second Schedule of the Federal Constitution should be read in a non-discriminatory way per art 8(2) to include 'mother'. This is because art 8(2) now declares that it will be unconstitutional to practice gender discrimination where only the blood descent of the father is recognised, but not that of the mother for citizenship purposes.

CTEB AND *CCH*

[273] In reaching my conclusions as above stated, I have not lost sight of the majority ruling of the Federal Court in *CTEB*, where the Federal Court read art 14(1)(b) restrictively and said that gender discrimination is constitutionally permitted and that save where the words are ambiguous or imprecise, the courts should not resort to canons of interpretation to achieve a result which goes against the clear letter of the law. This is how the Federal Court put it:

> [48] The fundamental rule in interpreting the FC or any written law is to give effect to the intention of the framers. The court cannot insert or interpret new words into the FC. The court may only call in aid of other canons of construction where the provisions are imprecise, protean, evocative or can reasonably bear more than one

meaning. I find s 17 is plain and clear in its meaning. The court should not endeavour to achieve any fanciful meaning against the clear letters of the law. A

[274] In *CTEB*, the Federal Court (by majority) went on to render the following opinion: B

> [85] A student of constitutional law will appreciate that not all forms of discrimination are protected by art 8. Article 8 opens with 'Except as expressly authorised by this Constitution ...'. In short, discrimination authorised by the FC is not a form of discrimination that art 8 seeks to protect. *There are in fact a number of discriminatory provisions expressed in the FC which include art 14. Since the discriminatory effect of art 14 is one authorised by the FC, it would be absurd and clearly lack of understanding of art 8 for any attempt to apply the doctrine of reasonable classification, to art 14*. C
>
> ...
>
> [88] This whole issue begs the question of *whether the Judiciary in the exercise of its judicial duty is constitutionally empowered to ignore or neglect the clear dictates of the FC and overcome that authorised gender bias in the name of progressive construction of the FC*. D
>
> Since the FC discriminates between a legitimate and an illegitimate child, a father and a mother of an illegitimate child, *can the court alter that discrimination so as to keep the FC living dynamically in order to avoid it from being locked and fossilised in 1963*? E

[275] But soon thereafter, in *CCH*, the Federal Court speaking through the learned Chief Justice opined as follows: F

> [46] *Citizenship no doubt is governed by Part III of the FC, but it is also a concept so inextricably linked to the right to life and personal liberty contained in* art 5(1). *As such, any provisions on it must be construed as widely as possible*.
>
> [47] Having said that, we are completely mindful of the following warning by Abdoolcader J (as he then was) in *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356 at p 360: G
>
> > I said in *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 ... that the *Constitution is not to be construed in any narrow or pedantic sense* (*James v Commonwealth of Australia* [1936] AC 578) ... *but this does not mean that a court is at liberty to stretch or pervert the language of the Constitution in the interests of any legal or constitutional theory, or even, I would add, for the purpose of supplying omissions or of correcting supposed errors*. (Emphasis added.) H
>
> [48] The courts have always had to do battle with these two conflicting principles. On the one hand, it is said that the Judiciary cannot purport to usurp the role of the Legislature. On the other hand, it is said that the Judiciary must be proactive to protect fundamental rights. No matter the argument, we are constantly reminded of these fears and/or duties by both sides taking their respective positions in constitutional cases. Where do we draw the line between these two extremes? I

A [49] We believe that the answer to the question has been discussed an innumerable amount of times with the most recent being *CTEB*. The starting point is the understanding that *fundamental rights and provisions must be construed as broadly as possible*. Next, *provisions which limit those rights must be construed as narrowly as possible*. Finally, *judicial precedent must play a lesser part when construing* B *constitutional provisions. One cannot afford to be pedantic or cling helplessly to tabulated legalism*.

[50] When construing a word or words in the FC protective of or guaranteeing a fundamental right, the court should give their widest possible meaning without changing or warping the 'base' meaning. And when construing interrelated C provisions, the court should read them as a whole having regard to the purpose and intent of those provisions and harmonise their collective meaning rather than put them at odds with another. (Emphasis added.)

D **[276]** In *CCH* the learned Chief Justice said that the types of discrimination which are permitted per art 8(2) of the Federal Constitution are those mentioned in art 8(5), which is said to be 'exhaustive'. This what the Federal Court said on this point:

[78] The jurisprudence on art 8(1) of the FC has been very much settled by a series E of cases decided by our courts. The most recent and authoritative pronouncement on art 8(1) is in the judgment of the nine justices bench in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 ('Alma Nudo'). This court, at para 117, upon affirming a long line of pronouncements on the subject advised that when interpreting other provisions in the FC the courts must do so in light of the 'humanising' and 'all-pervading' provision of art 8(1).

F

[79] Article 8(1) of the FC reads as follows:

> (1) All persons are equal before the law and entitled to the equal protection of the law.

G [80] Article 8(2) provides that:

> (2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground of only religion, race, descent, place of birth or gender in any law ...

H [81] Discrimination is not always unlawful. There are two ways in which the FC allows it. The first, as made plain by art 8(2), is where discrimination is expressly authorised by the FC itself. Article 8(5) is the constitutional exception to cll (1) and (2) of art 8. Clause 5 of art 8 reads:

> (5) This Article does not invalidate or prohibit —
>
> I (a) any provision regulating personal law;
>
> (b) any provisions or practice restricting office or employment connected with the affairs of any religion or of an institution managed by a group professing any religion, to persons professing that religion;

(c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;

(d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election;

(e) any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;

(f) any provision restricting enlistment in the Malay Regiment to Malays.

[82] Taking heed from *Lee Kwan Woh*, as art 8(5) is a derogation from liberty, it must be construed narrowly. Applying a narrow interpretation, the provision is clear as to the types of discrimination allowed under the FC and is, to that extent, exhaustive. A perusal of it does not suggest that it allows discrimination in respect of the conferment of citizenship under any of the provisions of Part III, ie the provisions on citizenship. In fact, as earlier observed, the FC guards against statelessness as seen in art 26B.

[277] In *Leow Fook Keong (L) v Pendaftar Besar Bagi Kelahiran dan Kematian, Jabatan Pendaftaran Negara, Malaysia & Anor* [2022] 1 MLJ 398; [2022] 1 AMR 23; [2021] AMEJ 1833; [2022] 1 CLJ 23(FC), the Federal Court recognised that, as part of its interpretative function, the court may rely upon an International Convention which Malaysia has acceded to and ratified to support or bolster the particular legislative interpretation that was being undertaken. In that case the Federal Court went on to refer to the CRC, to which Malaysia acceded and ratified to on 11 February 1995. Likewise, following the approach that was taken by the Federal Court in *Leow Fook Keong*, I see no real impediment in the court referring to CEDAW in exercising the interpretation function.

CEDAW

[278] This brings me to legislative history and CEDAW. As far the legislative history is concerned, whilst I agree that it plays an important role in the interpretation and understanding of a constitutional provision, the historical reasons for the legislation must necessarily yield to later legislative developments. Hence, in the present case, the framers of the Constitution did in fact address their minds to the topic and the result of that exercise by the constitutional minds at that time, after having taken the views of the Rulers, was the gender discriminating wording of art 14(1)(b) read with s 1(b), Part II of the Second Schedule of the Federal Constitution. However, in my view, the historical aspects of the said constitutional provision must give way to the later

(2001) amendment to art 8(2), which is a fundamental rights provision having an all-pervading influence or effect on the other parts of the Federal Constitution.

[279] As such, after 28 September 2001, it is no longer relevant or necessary to hark back to the thought process or intention of the original framers of the Federal Constitution.

[280] Indeed, if the historical aspects of the Federal Constitution are allowed to influence the interpretation process post-28 September 2001, then that would be antithetical to Malaysia's avowed intention of embracing CEDAW, since the 2001 amendment was precipitated by Malaysia becoming a signatory to CEDAW, albeit with reservation in regard to article 9(2) of CEDAW.

[281] In so far as Malaysia's reservations to CEDAW are concerned, it is my view that although Malaysia made it clear that it does not intend to abide by art 9(2) of CEDAW, such reservation has no impact on the interpretation of art 14(1)(b) read with s (1)(b), Part II of the Second Schedule of the Federal Constitution. This is because it is both, the function and constitutional duty of this court to interpret these constitutional provisions as they are presently worded. The Government's reservations to CEDAW cannot curtail the court's interpretative function.

[282] And in this regard, I find that the Government, whilst it may well have thought that gender discrimination will continue unabated post-28 September 2001, it nevertheless omitted to take the crucial step of amending art 8(5) to add 'matters concerning citizenship' under a new sub-para, or, alternatively, to add a *non-obstante* clause to art 14(1)(b), which would have achieved the intention of the Executive branch of Government to perpetuate gender discrimination under art 14(1)(b) read with s 1(b), Part II of the Second Schedule.

[283] I end this judgment by stating that in reaching the conclusions as alluded above, I was very much guided by the illuminating words of the learned Chief Justice in *CCH*, that 'fundamental rights and provisions must be construed as broadly as possible. Next, provisions which limit those rights must be construed as narrowly as possible. Finally, judicial precedent must play a lesser part when construing constitutional provisions. One cannot afford to be pedantic or cling helplessly to tabulated legalism ...'.

[284] Indeed, the judgment herein is but a manifestation of curial interpretation of the highly contentious issue concerning citizenship rights of Malaysian mothers and their ability to pass on such citizenship status (*jus*

sanguinis) to their children regardless of who their husbands are, and regardless of where the children are born. A

[285] In my view, the Government's current interpretation of art 14(1)(b) read with s 1(b) of Part II of the Second Schedule is one which countenances gender discrimination in circumstances where this is expressly forbidden via art 8(2) of the Federal Constitution. If the Government had intended that after 28 September 2001, the citizenship provisions, in this case, art 14(1)(b) read with s 1(b) of Part II of the Second Schedule, are to be discriminatory towards Malaysian mothers who are married to foreigners and who give birth outside the Federation of Malaysia, then that should have been constitutionally legitimised via an amendment to art 8(5) to cater for discrimination on 'citizenship matters', or amendment to art 14(1)(b) to add a *non-obstante* clause, both or either of which should have been done, and could have been done, but were not done at the appropriate time when art 8(2) was amended in 2001. B C D

[286] It is now rather too late in the day for the Government to contend that art 14(1)(b) read with s 1(b) of Part II of the Second Schedule is clothed with constitutional legitimacy merely be referring to the opening words of art 8(2). E

RESULT

[287] Thus, having due regard to the relevant principles of constitutional interpretation as discussed above, it is my view that: F

(a) the Eleventh Schedule of the Federal Constitution provides that words importing the *masculine gender include females*, and therefore, the word 'father' includes 'mother' and as such, the word 'father' in s 1(b), Part II of the Second Schedule of the Federal Constitution should be interpreted to mean *either parent*, that is, *father or mother*; G

(b) the recognition of citizenship by operation of law under s 1(b), Part II, Second Schedule of the Federal Constitution by virtue of the Malaysian mothers' citizenship and birth in the Federation of Malaysia is consistent with art 8(2) of the Federal Constitution; and H

(c) art 8(2) of the Federal Constitution should be interpreted in such a manner as to achieve the avowed purpose of complying with Malaysia's international obligations vis a vis CEDAW and also to ensure that the constitutional outlawing of gender discrimination does not become a mere pious platitude. (see *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (FC) per Raja Azlan Shah FJ (p 188) where His Royal Highness said, 'The Constitution is not a *mere collection of pious platitudes*'. I

A **[288]** For the reasons stated above, I am impelled to the conclusion that there was no error or misdirection on the part of the learned judge in allowing the amended Originating Summons No WA-24NCVC-2356–12 of 2020 as per the order dated 9 September 2021. As such I dismissed Appeal 531 with no order as to costs. As far as Appeal 273 is concerned, it is clear that there was a
B misdirection and error in the decision of the learned judge in dismissing Originating Summons No WA-24–73–12 of 2019. As such, appellate intervention is warranted. Hence, Appeal 273 is allowed with no order as to costs. The decision of the High Court dated 21 May 2020 is accordingly set aside. I made a consequential order and granted an order in the terms of
C Originating Summons No WA-24–73–12 of 2019.

Appeal 531 allowed and Appeal 273 dismissed.

Reported by Ashok Kumar

D

E

F

G

H

I